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THE MISCELLANEOUS REPORTS

CASES DECIDED

IN THE

COURTS OF RECORD

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OTHER THAN THE

Court of Appeals and the Appellate Division of the Supreme Court

WILLIAM V. R. ERVING, REPORTER

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2 Designated by the Governor as Presiding Justice of the Appellate Division, Second Department.

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8 Appointed by the Governor, January 22, 1917, in place of Benjamin N. Cardozo, appointed by the Governor a Judge of the Court of Appeals to fill a vacancy.

9 Appointed by the Governor January 10, 1917, in place of Cuthbert W. Pound, elected as an Associate Judge of the Court of Appeals.

10 Appointed by the Governor February 28, 1917, in place of Chester B. McLaughlin, appointed by the Governor a Judge of the Court of Appeals to fill a vacancy.

11 Appointed by the Governor April 23, 1917, in place of William L. Ransom, resigned.

12 Appointed by the Governor October 16, 1917, in place of William J. Carr, deceased.

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* Also Surrogate.

† Appointed by the Governor July 24, 1917, in place of William G. Cady, deceased.

‡ Appointed by the Governor March 14, 1917, in place of George R. Salisbury, resigned.

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THE

MISCELLANEOUS REPORTS

OF THE

STATE OF NEW YORK.

COMMENCING AUGUST, 1917.

JOSEPH BOSS, Plaintiff, *v.* J. HERBERT HUTCHINSON, Defendant.

(Supreme Court, New York Special Term, August, 1917.)

Undertakings — appeal — justification of sureties — when motion to vacate denied — Code Civ. Pro. § 1335.

Under section 1335 of the Code of Civil Procedure, which provides that the sureties on an undertaking on appeal "must justify before the court below, or a judge thereof, or a referee appointed by the same, or a county judge," the justification of sureties may be taken before the county judge of a county other than that in which the action is brought.

Where a notice of justification of the sureties in an undertaking on appeal was returned for the reason that the justification was not to take place in the county in which the venue of the action was laid, a motion to vacate and set aside the undertaking will be denied.

MOTION to vacate and set aside an undertaking on appeal.

Isidore Faitt, for plaintiff and motion.

Lynn Brothers, for defendant, opposed.

GIEGERICH, J. The plaintiff makes this motion to vacate and set aside the undertaking on the appeal

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given by the defendant upon the ground that the sureties on the undertaking failed to justify within the time prescribed by section 1335 of the Code of Civil Procedure. The sureties named in the undertaking are residents of the county of Monroe, and after the plaintiff's exception to their sufficiency the defendant served a notice of justification to take place before a county judge of Monroe county at his chambers in the court house in the city of Rochester. On the day of its receipt the plaintiff's attorney returned this notice with a statement that the reason for such return was that the justification for which the notice was served was not to take place in the county in which the venue of the action was laid. The question presented, therefore, is whether such a justification has to be taken in the county in which the action is brought. Neither side cites any case decided in this state bearing upon the point. Upon searching through other portions of the Code for any indication of the legislative intent on the point in question, it is found that in section 772, which contains provisions as to what judges may take orders out of court, the jurisdiction of a county judge is limited to the judge of the county where the action is triable or in which the attorney for the applicant resides. So, too, section 2434, in making provisions as to what judges may entertain supplementary proceedings, limits the jurisdiction of county judges by express conditions dependent upon the county in which the execution was issued or other conditions therein specified. These provisions seem to indicate that where a power conferred upon a county judge is intended to be limited to judges of certain counties, such limitation is expressed in the statute. Section 1335, however, does not impose any limitation, but, on the contrary, uses the broadest language possible, namely, that the sureties

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"must justify before the court below, or a judge thereof, or a referee appointed by the same, or a county judge." Sections 578 and 1705 of the Code of Civil Procedure look in the same direction; the former section, while providing that the justification of the sureties on a bail bond may be taken before a county judge, limits the place to the county "where one of the bail resides, or where the defendant was arrested," while the latter section, dealing with the justification of sureties in actions of replevin, imposes the limitation that the justification must take place either in the county where the chattel was replevied, or in the county where one of the sureties resides. Considering all these statutory provisions together, I do not think it can fairly be inferred that, in using the broad language employed in section 1335, the legislature intended to impose the limitation for which the plaintiff contends. The motion is denied, with ten dollars costs.

Motion denied, with costs.

GRACE HUMISTON, Plaintiff, *v.* UNIVERSAL FILM MFG. CO., Defendant.

(Supreme Court, New York Special Term, August, 1917.)

Injunctions — who entitled to — restraining use of moving picture films — Civil Rights Law, §§ 50, 51.

The use by defendant of plaintiff's name and picture without her consent for display in a moving picture film purporting to represent an occurrence in which she had taken a part and by which defendant is seeking to make money out of plaintiff's reputation and prominence is contrary to the provisions of sections 50 and 51 of the Civil Rights Law and she is entitled to an injunction *pendente lite* restraining such use of her name and picture.

MOTION for injunction *pendente lite.*

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Edward K. Sumerwell (Louis S. Posner, of counsel), for plaintiff.

Stanchfield & Levy and Siegfried F. Hartman, for defendants.

ORDWAY, J. Motion for injunction *pendente lite* to restrain defendants from using and displaying the plaintiff's name, photograph and portrait in their moving picture films, contrary to the provisions of sections 50 and 51 of the Civil Rights Law. The defendants have organized and are conducting a business called the "Universal Animated Weekly," in which they produce and distribute for use by their customers reels of films of motion pictures, which are photographs of actual current events which they deem of public interest. These reels are produced and distributed weekly and are exhibited all over the country in moving picture theatres as soon as possible after the occurrence of the events depicted. The defendants furnish with them to their customers posters which are used as bulletins for displaying outside of the place of exhibition to inform the public what will be shown within. The defendants admit that "this service is marketed and sold" by them, and is "a source of substantial profit" to the defendants.

In their reel of films used as above described and called "Universal Animated Weekly No. 77," the defendants have included photographs of pictures of the plaintiff, accompanied with the following "legends:"

"Woman lawyer solves Ruth Cruger mystery. After world-wide search, Mrs. Grace Humiston's persistent efforts lead to discovery of high school girl's murder — New York City. Sub. The woman who succeeded where police failed — Mrs. Grace Humiston. In Cocchi's cellar — passed by millions — the crime

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was hidden for months. Thousands attracted to scene of crime."

They have also furnished posters or publicity matter accompanying said number of the "Weekly" films, to be used by their customers as above described, containing in large display type the same words as appear in the main legend above quoted. These reels of films and posters are being used by at least fifty customers of the defendants in moving picture theatres in New York city and other parts of the country.

The plaintiff has not given her written consent to this use of her name and picture, and now brings suit for an injunction against such use and for damages. In my opinion this case cannot be distinguished in principle from the case of *Binns* v. *Vitagraph Co.*, 210 N. Y. 51. The defendants attempted to distinguish it on the ground that in the *Binns* case the films were not photographs of an actual event and of actual people, but were photographs of actors posed for the purpose and of scenery simulating the actual scenes of the wreck of the *Republic*, that is, were really a photoplay, whereas in this case the films are photographs of actual people and events precisely as they acted and happened, and further argue that there is a legal distinction between photoplay as commonly known and used and their service, which they contend is a regular weekly news service for the dissemination of information to the public, and analogous to a regular newspaper or at least to a weekly newspaper or magazine.

In my opinion there is no foundation for any legal distinction between the two cases. The "information" which is being "disseminated" by defendants' films is of the same character as that "disseminated" by the Binns films. The fact that the defendants' films are photographs of actual current events and are

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called "Universal Animated Weekly" and are produced and distributed weekly and used as soon as possible after the occurrence of the events does not make them a newspaper, or bring them within the protection extended to newspapers by the cases of *Colyer* v. *Fox Publishing Co.*, 162 App. Div. 297, and *Jeffries* v. *New York Evening Journal Publishing Co.*, 67 Misc. Rep. 570, on which defendants rely. I do not understand that in those cases the courts founded their decisions upon the constitutional protection of the freedom of the press, and defendants expressly disclaim that they are relying upon such constitutional provisions. As I understand those cases the courts merely held that the legislature did not intend by chapter 132 of the Laws of 1903, now sections 50 and 51 of the Civil Rights Law, to extend the prohibitions of that statute to newspapers. But that is very far from holding that such a service as the defendants conduct is a newspaper or that the acts complained of are not prohibited by the statute. The Supreme Court of the United States has recently had occasion to consider the character of such service in the case of *Mutual Film Corporation* v. *Industrial Commission of Ohio*, 236 U. S. 230, where the question was involved of the constitutionality of a censorship of a service which included (p. 232) "events of historical and current interest — the same events which are described in words and by photographs in newspapers, weekly periodicals, magazines and other publications, of which photographs are promptly secured a few days after the events which they depict happen; thus regularly furnishing and publishing news through the medium of motion pictures under the name of 'Mutual Weekly,'" and said (p. 244): "It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for

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profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion."

The defendants argue that they are not using the plaintiff's name and picture "for advertising purposes or for the purposes of trade." I cannot agree with them. The films are used in the defendants' regular business, for purposes of profit, and the posters are used to advertise the films and to induce the public to patronize the theatres where the films are exhibited. In other words, the defendants are exploiting the plaintiff's name and picture in their business for profit, and even if they are incidentally disseminating information as to current news of the day, the plaintiff has the right to object and to an injunction against the continuance of such conduct. In *Binns* v. *Vitagraph Co., supra,* the court said (p. 58): "We hold that the name and picture of the plaintiff were used by the defendant as a matter of business and profit and contrary to the prohibition of the statute. It is urged that there is danger of serious trouble in the practical enforcement of any rule which may be adopted in construing and enforcing the statute, so far as it relates to purposes of trade. If there is any basis for the suggestion of danger in enforcing a part of the statute under consideration it is the duty of the legislature to repeal such part thereof."

As the court said in *Almind* v. *Sea Beach Railway Co.,* 157 App. Div. 230, 232: "The right of privacy under the statute cannot be invaded for purposes purely informative or redemptive, whether the altruist be entirely a charitable envoy or a railway company. No cause is so exalted that it may allure by exposing the portrait of a person to the public gaze."

The defendants argue that if this motion is granted

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it will seriously interfere with, if not destroy, their business, which gives information as to current events and innocent amusement to thousands, and they set out at length the services they are rendering to the government and to the Red Cross in connection with the present war and the activities of good citizens in connection therewith. Even if this were true, the remedy is by an appeal to the legislature, but the results they pretend to fear are not likely to follow. While I am not called on to decide the point, it is not probable that any court will enjoin the use of moving picture films of current events of real public importance, because they happen as a mere incident to include among many the picture of an individual. As the court said in the *Binns* case (p. 57): "It is not necessary in this opinion to discuss the question whether a person, firm or corporation would be liable under the statute for making and using a picture of a living person when it is included in a picture of an actual event in which such person was an actor, and such picture is a mere incident to the actual event portrayed. The use of the plaintiff's name and picture as shown by the testimony in this case was not a mere incident to a general picture representative of the author's understanding of what occurred at the wreck of the Republic."

There is a clear distinction between a merely incidental and fortuitous use of an individual's picture as an incident to some important public event, and the exploitation of that individual as the important and central part of an event which is not of real public importance, however great may be the public interest therein. In this case it is clear that Mrs. Humiston's name and picture are the main point of that part of defendants' film relating to the Cruger murder, and that the defendants are seeking by the use of her name

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and picture to make money out of her reputation and prominence. She is not the commander of an army, a visiting ambassador or even a public official, but a private citizen practicing her profession as a member of the bar, who is entitled to be protected in her right of privacy.

It is conceded that the plaintiff gave no written consent to the use of her name and picture, and although it is claimed that she orally consented she denies that fact, and it is immaterial on this motion. So also the fact, if it be a fact, that her name and picture have appeared frequently with her consent in the daily news papers is not material on this motion. All these facts may perhaps be material on the question of her damages, but that is not before me now. As Judge Gray said in the case of *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, 566: "It would be, in my opinion, an extraordinary view which, while conceding the right of a person to be protected against the unauthorized circulation of an unpublished lecture, letter, drawing, or other ideal property, yet, would deny the same protection to a person whose portrait was unauthorizedly obtained, and made use of, for commercial purposes. The injury to the plaintiff is irreparable; because she cannot be wholly compensated in damages for the various consequences entailed by defendants' acts. The only complete relief is an injunction restraining their continuance. Whether, as incidental to that equitable relief, she should be able to recover only nominal damages is not material; for the issuance of the injunction does not, in such a case, depend upon the amount of the damages in dollars and cents."

Motion for injunction during the pendency of this action granted on plaintiff giving an undertaking in the sum of $2,500.

Motion granted.

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PEOPLE ex rel. BROOKLYN HEIGHTS RAILROAD Co. et al., Relators, *v.* PUBLIC SERVICE COMMISSION OF THE FIRST DISTRICT et al., Defendants.

(Supreme Court, New York Special Term, August, 1917.)

Certiorari — allegations contained in petitions for writs of — questions to be determined upon hearing on return to writs — street railways — motions to quash writs granted — Code Civ. Pro. § 2140.

A motion to quash a writ of certiorari may be granted either upon the papers upon which it was granted or upon additional affidavits and either before or after return thereto, and where it appears to have been improvidently granted the motion should prevail.

Where the allegations of a petition for a writ of certiorari to review an order of the public service commission for the first district, directing relators to provide additional cars for public use on their several railroads, though substantially based upon the provisions of section 2140 of the Code of Civil Procedure, stating the questions to be determined upon the hearing on the return to the writ, are not supported by any allegations of fact whatsoever, and taken as a whole amount to nothing more than a sworn statement that the commission was wrong in making the order sought to be reviewed, that its action was unjustified, that petitioners are agreed and that they ask an opportunity to review said orders, and it appears that relators have had an opportunity to supplement the bare allegations of their petitions by replying affidavits and have failed so to do, and an examination of all the papers fails to disclose a single fact from which it can be judicially determined that the order of the commission is even *prima facie* unreasonable, unwarranted or unlawful, the court cannot determine that there is reasonable ground to believe that error has been committed, and motions to quash the writs will be granted.

The public service commissions should not be hampered and obstructed in their efforts to secure increased transit facilities for the public by proceedings for a court review of their determination except in cases where it clearly appears that it is "necessary to keep them within the law and protect the constitutional rights of corporations over which they were given control."

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MOTIONS to quash four writs of certiorari.

William L. Ransom (Godfrey Goldmark, with him on brief), for motions.

D. A. Marsh, George D. Yeomans, Charles A. Collin and John L. Wells, in opposition.

ORDWAY, J. These are motions to quash four writs of certiorari granted by the court to review an order of the public service commission directing the relators to provide additional cars for the use of the public on the several railroads of the relators. The writs were granted *ex parte,* and the defendants now move to quash the same upon affidavits which are answered by affidavits of the relators.

It is well settled that the writ of certiorari is a discretionary writ, and that a motion may be made to quash the same, either upon the papers upon which it was granted or upon additional affidavits, and either before or after return thereto. Such a motion invokes the exercise of the discretion of the court, and the motion should be granted where it appears that the writ was improvidently granted.

In these cases the papers are very voluminous, and the defendants argue that the writs should be quashed on the ground that the petitions therefor are insufficient to justify the allowance of the writs, and on the further grounds that these proceedings are not conducted in good faith or for the real purpose of reviewing the order which they purport to seek to review, but for the purposes of delay, and that justice and the public interests will not be promoted by allowing the writs to stand.

The Court of Appeals of this state, in the recent case of *People ex rel. New York & Queens Gas Co.* v.

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McCall, 219 N. Y. 84, stated the grounds for sustaining such a writ of certiorari and vacating the order sought to be reviewed as follows: "The order may be vacated as unreasonable if it is contrary to some provision of the federal or state constitution or laws, or if it is beyond the power granted to the commission, or if it is based on some mistake of law, or if there is no evidence to support it, or if, having regard to the interests of both the public and the carrier, it is so arbitrary as to be beyond the exercise of a reasonable discretion and judgment."

It would seem, therefore, that it is necessary in order to justify this court in granting or upholding a writ of certiorari that facts should be shown which tend to prove the existence of some one of these reasons for vacating the order sought to be reviewed. In these cases the petitions merely state "that the aforesaid order of February 8, 1917, is erroneous and illegal, and that the said Public Service Commission of the State of New York for the First District erred to the prejudice of your petitioner in making the same; that there was no competent proof before the commission of the facts necessary to be proved in order to authorize the making of said order of February 8, 1917; that there was upon all the evidence such a preponderance of proof against the existence of facts necessary to be proved in order to authorize the making of said order that the verdict of a jury affirming the existence thereof rendered in an action in the Supreme Court triable by a jury would be set aside by a court as against the weight of evidence; that the requirements of said order of February 8, 1917, are unjust, unreasonable and illegal and not warranted by the proofs taken upon the hearings before the said commission; that the said Public Service Commission of the State of New York for the

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First District was without power or jurisdiction to make said order; that the action of said commission in granting said order was arbitrary and unreasonable, and that the rules of law affecting the rights of the petitioner have been violated, to its prejudice; that the proofs taken by the commission do not warrant the conclusion that your petitioner should purchase or provide additional surface cars to the extent provided in said order and within the time therein provided; that compliance with said order would amount to a confiscation of the property of your petitioner and be a taking of property without due process of law, and that the said order of the said commission should be set aside and vacated."

These allegations are substantially based upon the provisions of section 2140 of the Code, stating the questions to be determined by the court upon the hearing on the return to the writ. They are not supported by any allegations of fact whatsoever. There are allegations in paragraph 6 of the petitions to the effect that the relators " provided and used cars sufficient in number to reasonably accommodate passengers offering themselves for transportation and to render adequate service or facilities for the transportation of passengers," etc., but there is no allegation of facts tending to show that there was any evidence before the public service commission to that effect, or no evidence to the contrary, and the allegations of paragraph 6 amount at most to nothing more than an allegation that the order of the public service commission was unreasonable, which is not a sufficient reason for sustaining a writ of certiorari. While allegations of fact are contained in the notice of February 27, 1917, annexed to the petitions as Exhibit A, that notice is not verified, nor is it incorporated in the petitions except as a notice (petition, ¶ 5), nor is it

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alleged that the facts therein stated were before the commission on the hearings.

It seems to me that the allegations of the petitions upon which the writs were issued are mere conclusions and do not constitute a sufficient ground for the issuance of the writs. The petitions, taken as a whole, amount to nothing more than a sworn statement that the public service commission was wrong, that its action was unjustified, that the petitioners are aggrieved, and that they ask an opportunity to review the orders of the public service commission in the courts. This is little more than a notice of appeal, but the law gives the relators no right to appeal from the decisions of the public service commission. If it had been intended to give them such right of appeal, it would undoubtedly have been granted by the statute. Undoubtedly the relators are entitled to a judicial review of the questions of law which the commission must be deemed to have decided in making its order (*Wadley Southern R. Co.* v. *Georgia,* 235 U. S. 651), but there are other ways of obtaining such relief, and it does not follow that they are necessarily entitled to that review by a writ of certiorari. That writ is discretionary, and while the discretion is not an arbitrary one and the writ should be allowed in a proper case (*People ex rel. Joline* v. *Willcox,* 129 App. Div. 267; 194 N. Y. 383), it can only be allowed where the petitioner shows a proper case for the issuing of the writ (Code Civ. Pro. § 2127), and it should not be allowed except where sufficient reasons therefor are shown to the court.

As was well said by Mr. Justice Finch in *People ex rel. Heaney* v. *Woods,* N. Y. L. J. March 29, 1916: "This motion to quash writ of certiorari is granted. Section 2127 of the Code of Civil Procedure requires that 'the petition must show a proper case for the

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issuing of the writ.' It would seem that this can only mean that the petition must set forth facts from which an inference may be drawn that an injustice has been done the relator. There must be set forth more than a mere conclusion of the relator. A compliance with this requirement will tend to make a motion for a writ of certiorari really a decision as to the sufficiency of the petition instead of, in effect, making such a decision a mere perfunctory allowance of an appeal." See, also, *Matter of Rosenthal,* 133 App. Div. 733; *People ex rel. Miller* v. *Peck,* 73 id. 89, 92.

The relators have had an opportunity to supplement the bare allegations of their petitions in their replying affidavits, but they have failed to do so. A careful examination not only of the petitions, but of the replying affidavits, fails to disclose a single fact from which the court can determine judicially that the order of the commission is even *prima facie* unreasonable, unwarranted or unlawful. Under such circumstances this court cannot determine in its discretion that there is reasonable ground to believe that error has been committed.

As I observed upon the argument of these motions, it is difficult to discover just what the real controversy is in these cases or what the relators' real grounds of objections are to the order complained of. Although there is some intimation that the relators regard the increased number of cars ordered as unnecessary, the papers seem to show the contrary, and so far as I can make out the only points that seem to be really in dispute are, first, as to the character of the cars, whether they should be trailer cars or motor cars, and, second, as to the date when the companies should be required to put them into service. As to the first point, the order complained of does not provide how many of the cars shall be trailer cars and how many shall be motor

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cars. There is nothing in the papers to indicate that the commission is going to insist upon their being all motor cars, or any of them motor cars. It is true that the plans for the cars must be approved by the commission, which probably includes the determination of the kind of cars, but until the commission has rejected plans for trailer cars it cannot be said that the commission intends to insist upon all of the cars being motor cars. The commission expressly disclaims any intention to require all of the cars to be motor cars. So far as this point is concerned, it seems to me that the application for the writs is premature, even if writs should be allowed in such case at all. As to the second point, there is no evidence in these papers to justify the conclusion that the companies cannot obtain the cars ordered and put them into service by the date fixed in the order. It is true that the companies allege that they may find it impossible to get the cars by that date on account of the conditions resulting from the war. They wrote to the commission on June 1, 1917, that "an effort will be made to ascertain whether cars can be secured to conform to such specifications in a reasonable time at a reasonable price." It does not appear from the papers whether they have made such effort or, if they have, what was the result. Mere allegations that it may be impossible to obtain the cars by the date fixed by the commission or within a reasonable time, or at a reasonable price, are insufficient to justify a review of the order by writs of certiorari. There is no allegation in the papers that any such facts were presented to the commission at the time that the order was made, and for that reason writs seeking to review the order upon that ground would now be improper. Section 22 of the Public Service Commissions Law provides that where facts arise subsequently to the making of an order which are deemed to entitle the

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companies to a modification of the order which the commission has made, the companies have no standing in court until they have exhausted the remedy afforded by the statute and have given the commission opportunity to afford suitably the relief desired. As I have said, it does not appear that such facts have yet arisen, but if they do the companies have their remedy under section 22 of the law and are not justified in now asking the court to review on this ground an order of the commission made when these facts were not before them.

The relators argue that these writs of certiorari do not act as a stay of the order of the commission, and that, therefore, they do not delay the operation and performance of the order, and that no harm will be done to the public interests by allowing them to review the order in the courts by these writs. They do not, however, state that they will go ahead and obey the orders pending such review, and it will be noticed that section 24 of the Public Service Commissions Law provides that "if the defendant in such action (an action in the name of the people to recover the penalties and forfeitures provided for in the statute) shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of an order of the commission the defendant was actually and in good faith prosecuting a suit, action or proceeding in the courts to set aside such order, the court shall remit the penalties or forfeitures incurred during the pendency of such suit, action or proceeding." See 129 App. Div. 267, 273. It seems to me to follow from this that, while these writs of certiorari if allowed to stand do not actually constitute a stay, nevertheless no penalty or forfeiture can be enforced against the relators pending such certiorari proceedings for failure to obey the order, and therefore that

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the relators will be able with impunity to refuse to obey the order or to delay compliance therewith during the pendency of such proceedings.

In my opinion, public service commissions should not be hampered and obstructed in their efforts to secure increased transit facilities for the public of this city by proceedings for a court review of their determinations, except in cases where it clearly appears that it is "necessary to keep them within the law and protect the constitutional rights of the corporations over which they were given control." It does not seem to me that has been shown in these cases, and in the exercise of the discretion vested in the court the motions to quash these writs should be granted, with ten dollars costs in each case.

Ordered accordingly.

LOUIS GREENBERG, Plaintiff, *v.* ROBERT MARSH, DEFENDER CONSTRUCTION CO. and EDMUND FRANCIS REALTY CO., Defendants.

(Supreme Court, Bronx Special Term, August, 1917.)

Mechanic's lien — foreclosure of — actions — contracts — negotiable instruments — costs — Code Civ. Pro. § 3253.

Though two actions to foreclose mechanic's liens are tried together they must be decided separately, and requests to find submitted in form as if the actions had been consolidated will be refused as not in proper form.

Where in an action to foreclose a mechanic's lien it appears that plaintiff, a materialman, has fully performed his contract with the principal contractor except in so far as prevented by defendants, he is entitled to recover the fair and reasonable value of the materials and labor furnished by him and has a valid lien on the property therefor.

Where plaintiff accepted in settlement of two certain payments, one-half cash and one-half notes which did not bear

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interest, any item of interest on the notes cannot enter into the value of material delivered for which a lien is claimed.

Under section 3253 of the Code of Civil Procedure an extra allowance of ten dollars is all that may be granted to the successful plaintiff herein.

ACTION to foreclose mechanics' liens.

Louis Rosenberg, for plaintiff.

Charles D. Reed, for defendant Defender Construction Co.

Miller & Hartcom, for defendant Edmund Francis Realty Co.

ORDWAY, J. These are two actions to foreclose mechanics' liens. The actions were tried together, but, of course, must be decided separately. The attorney for one of the defendants has submitted one form of requests, as if the actions had been combined; his requests cannot be passed on because not in proper form, and are therefore refused. Defendant Marsh had two contracts for the plumbing, one for each building owned by the defendant Defender Construction Company. He entered into two subcontracts with the plaintiff to supply the materials. These contracts were entire, that is, a lump sum was agreed to be paid for all material to be supplied, but in order to consider the points raised on the trial the materials may be divided into four parts. Certain material was to be supplied to be placed in the building before it was completed sufficiently to receive the fixtures; this material was substantially all of the so-called roughing. Then there was a small part of the material needed to place the fixtures; this was not delivered until the building was ready for the fixtures. Then there were

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the fixtures, and in addition there was extra material, not covered by the contract, but needed and ordered by the contractor, Marsh. The plaintiff delivered on each building the roughing material above mentioned and the extra material, but he never delivered the fixtures, except a few on each building, or the balance of the material mentioned above as needed to place the fixtures. The controversy has arisen over the failure to deliver these items. The defendants at the outset contended that the plaintiff's liens were void, because filed for a sum grossly in excess of the amount due, and that such gross excess was apparent on the face of the liens. The plaintiff stated in his liens the amount of the contract, the value of the material delivered, the value of material to be delivered, the amount paid on each contract and the amount due for material delivered. The lien was filed, as permitted by the Lien Law as it then existed, to cover materials delivered and to be delivered. While the amount of the lien was in each case four or five times the amount claimed to be due, it was exactly the amount claimed to be due and to become due should all material be delivered. The amount actually due was plainly evident on the face of the liens, and they must be held to be valid. The defendant owners claim further that they are not bound by the liens, because they did not know that the plaintiff was a subcontractor and did not consent to his furnishing the materials and because no notice of lien was served on them. I must hold that the evidence proves the contrary, and shows that the Defender Construction Company knew at the time plaintiff's contract was made that it was being made, and what it contained as to fixtures; that the defendant Edmund Francis Realty Company when it took the deed of the premises, or shortly thereafter, knew that plaintiff had the contract for the plumbing materials;

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that he furnished such materials with the knowledge and consent of both of them, and that plaintiff served notice of lien on both of said defendants. It is true that the plaintiff was somewhat confused in his testimony, but enough was shown by uncontradicted evidence to prove service of the notice. The defendants further claim that plaintiff breached his contracts, and that the defendant Marsh was compelled to purchase materials of other supply men at a cost in excess of the balance due plaintiff. If they are correct in this claim, of course, plaintiff cannot recover. But in my opinion, they are not correct. The contract defendant Marsh had with the owner called for a certain class of fixtures, while his contract with the plaintiff called for an inferior quality. I am inclined to think, from the evidence, that the defendant Marsh hoped and expected to be permitted to install an inferior grade of fixtures, but because of a change of ownership was unable to carry out this plan. The plaintiff delivered for approval samples of certain fixtures which he claimed to be of the grade called for by his contract, but the new owner rejected them. The plaintiff, although claiming that they were in accordance with his contract, notified defendants that he was ready and willing that defendants should select the fixtures themselves, only limited by the grade called for by his contract, and offered to furnish same. The defendants declined to accept such offer and insisted on plaintiff delivering the better grade called for by the contract with Marsh. This was not a breach by plaintiff of his contract with Marsh, but was rather a breach of that contract by the defendants. It follows that the plaintiff, having been prevented by the defendants from carrying out his contracts in their entirety, and having fully performed, except in so far as prevented by the defendants, is entitled to recover the value of the

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materials furnished by him, and has a valid lien on the property therefor. Under the express provisions of the Lien Law, I am of the opinion that the fact that the unperformed part of plaintiff's contract with Marsh called for materials of an inferior quality to those called for by the owners' contract with Marsh is no defense to this action, so long as the plaintiff was ready and willing to perform his contract and offered to do so. It is clear also that the plaintiff's liens are valid as against defendant Edmund Francis Realty Company, both because the lien was filed before the deed to it was recorded, and because of its knowledge of and assent to plaintiff's furnishing the materials. There remains to be considered the fair and reasonable value of the material delivered by the plaintiff. The proofs convince me that the values given by the plaintiff are fair and reasonable, and that the values given by the defendants are unfairly reduced. In the first place, the plaintiff was to receive a payment of $1,300 on one contract and $1,400 on the other contract when the roughing material was delivered, and it was proved to my satisfaction that those sums were considered as about 80 per cent. of the value of the materials that would have been furnished when those sums were paid. In each instance the remaining twenty per cent, or thereabouts, slightly exceeded the amounts claimed by the plaintiff as the value of the material furnished after deducting the payments. In the next place the testimony of one of defendants' witnesses that the reasonable value of the materials furnished by plaintiff would be wholesale cost plus ten per cent to cover all plaintiff's expenses, profits, etc., does not seem to me to be reasonable, and I think that plaintiff's testimony of twenty per cent to twenty-five per cent addition to wholesale cost is more reasonable. On all the evidence, I hold that the plaintiff's figures as to reason-

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able and fair value of material furnished by him are correct. There is one item included in plaintiff's bill of particulars in action No. 1 which is disallowed. Plaintiff accepted in settlement of the two payments of $1,300 and $1,400 one-half cash and one-half notes. If he omitted to see that the notes he took did not bear interest it was his own fault, and as he took the notes in settlement he cannot charge interest thereon. Any item of interest on notes cannot enter into the value of material delivered for which a lien is claimed. I have therefore disallowed the item of $14 interest in action No. 1. Judgment for plaintiff, with costs and an extra allowance of $10, which is all that section 3253 of the Code permits, in each case. The requests to find submitted by the parties have been passed on and filed, except that those submitted in behalf of defendant Marsh have been refused *in toto* as not in proper form. Submit decisions containing all findings and conclusions found, also proposed judgments to be settled on notice.

Ordered accordingly.

PEOPLE ex rel. HENRY J. DOSCHER, Relator, *v.* HERBERT S. SISSON, State Commissioner of Excise, Respondent.

(Supreme Court, Kings Special Term, August, 1917.)

Constitutional law — unconstitutionality of chapter 521, Laws of 1917 — statutes.

Certiorari — review of order of state excise commissioner — statutes — injunctions.

A statute (Laws of 1917, chap. 521) empowering the state excise commissioner, with the approval of the governor whenever in his opinion public safety requires and on the application of the mayor of a city, to suspend privileges under liquor tax certificates during the present war in

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such parts of the city as are in proximity to camps, barracks or munition factories, and which does not provide for the giving of notice to the parties to be affected and no opportunity to be heard on the question whether the suspension should be ordered, is unconstitutional as a taking of private property without due process of law for a public use without compensation; such statute is also unconstitutional in that it attempts to delegate legislative power.

On certiorari to review an order of the state excise commissioner suspending relator's privileges under his liquor tax certificate procured long before the enactment of said statute and prohibiting him from selling alcoholic beverages then on hand, the state excise commissioner will be enjoined from enforcing such order of suspension pending a decision on the writ.

APPLICATION for writ of certiorari.

Celler & Kraushaar, for relator.

Harry D. Sanders, for respondent.

CROPSEY, J. The relator applies for a writ of certiorari to review the action of the commissioner of excise in issuing an order suspending the relator's privileges under his liquor tax certificate and prohibiting him from selling alcoholic beverages. The order was issued under the provisions of chapter 521 of the Laws of 1917. That chapter empowered the excise commissioner, with the approval of the governor whenever in his opinion public safety required it and on the application of the mayor, to suspend privileges under liquor tax certificates during the present war in such parts of the city as are in proximity to camps, barracks or munition factories. The papers show that the mayor of the city of New York applied to the excise commissioner to suspend the privileges under liquor tax certificates in a certain section of the borough of Brooklyn, and that the commissioner made the order in question, which has received the approval of the governor. The section within which the sale of liquor

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is prohibited extends from 100 feet north of Fifty-second street to Sixtieth street and from 100 feet east of Third avenue to New York Bay. The relator conducts a grocery store within the prohibited area and in connection with it had the license to sell liquor to be drunk only off the premises. He does not have the regular saloon license and cannot sell liquor to be drunk on the premises. In connection with making the application for the writ the relator seeks a restraining order preventing the enforcement of the excise commissioner's order pending the hearing and determination on the writ. The constitutionality of the act under which the order was made is assailed, and as it is said to be the first instance in which that statute has been construed the court thought it proper, although the Code does not require it, to have notice given to the excise commissioner. This has been done and his attorney has submitted a memorandum bearing on the constitutionality of the statute under which he has acted. The claim is made that the act takes property without due process of law and that it takes it for a public use without making compensation. The question is an especially important one. It is important because of the desirability and necessity of upholding, wherever possible, all war measures. On the other hand it is of momentous importance to the relator, for he has a large stock of liquors on hand which he bought on the assumption that he would have the right to sell them under his liquor tax certificate, which he procured last October, long before the act in question became a law. Under the excise commissioner's order he is prohibited from selling this liquor. The order is virtually an absolute prohibition against a sale, for while on its face it merely prohibits the sale within the prescribed territory it, in effect, prohibits him from selling it anywhere, for a sale cannot be made

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unless in quantities of five gallons or over without a license (Liquor Tax Law, § 30). All the relator's rights under his liquor tax certificate have been suspended and he is in the same situation as though he had never had a license. While he is thus deprived of the right to sell liquor his competitors, within one block of his place, who are in exactly the same kind of business, are permitted to sell it, as they are outside of the prescribed zone. The effect upon the relator, as the papers show, would be to work a great injury and damage to his business and thus to him. While in a very real sense individuals must in times of war yield to the government, it is still true that the government must proceed lawfully. No emergency justifies an act of lawlessness. So the question is clearly raised whether chapter 521 is constitutional. No attempt will be made to discuss at any length this question. But a brief statement of the reasons which induce this decision should be given. Originally a "license" to sell liquor was a mere privilege. It did not involve any right of property. So it could be revoked or suspended pursuant to legislative authority and the holder of it had no legal ground for redress. *Metropolitan Board of Excise* v. *Barrie*, 34 N. Y. 657; *Kresser* v. *Lyman*, 74 Fed. Repr. 765. But this is not true of the liquor tax certificates issued under the provisions of the Liquor Tax Law which was first enacted in 1896. Under that law certificates are no longer issued as matter of discretion, but are obtainable as matter of right, if the statutory requirements are met. Under that law the liquor tax certificate confers upon its holder a property right which is well recognized. *Matter of Lyman*, 160 N. Y. 96; *Matter of Livingston*, 24 App. Div. 51; *Matter of Lyman* (*Texter Certificate*), 59 id. 217–220. Such a certificate constitutes a contract with the state. *Matter of Hilliard*,

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25 App. Div. 222–225; affd., 155 N. Y. 702. A license or privilege for selling liquor which does not involve or constitute a property right can be revoked or suspended as already shown, and there are many other authorities to that effect. *Stone* v. *Mississippi,* 101 U. S. 814; *Butchers Union Co.* v. *Crescent City Co.,* 111 id. 746; *Mugler* v. *Kansas,* 123 id. 623. On the other hand, where the authorization to sell liquor constitutes a property right it has never been held that it can be taken away, unless proper compensation is made. On the contrary, it has been expressly held that an act passed after the liquor tax certificate had been issued which purported to empower the commissioner to revoke the certificate under certain conditions was invalid. *People ex rel. Loughran* v. *Flynn,* 110 App. Div. 279; affd., 184 N. Y. 579. The only authorities cited by the respondent to sustain the constitutionality of the act are *Metropolitan Board of Excise* v. *Barrie,* 34 N. Y. 657, and *Kresser* v. *Lyman,* 74 Fed. Repr. 765, which we have already cited. In those cases the licenses in question had been issued under the excise laws in force before the adoption of the Liquor Tax Law, and so at a time when the issuance of a license did not carry with it any property right. Consequently they have no bearing on the question that now arises under the Liquor Tax Law. Moreover, the *Barrie* case was referred to in the *Loughran* case. Furthermore, even under the old excise laws it was held that a statute which revoked a license and prohibited its holder from disposing of liquor which he had on hand at the time of the passage of the act was unconstitutional, as it deprived him of his right of property in the liquors on hand. *Wynehamer* v. *People,* 13 N. Y. 378; *State* v. *Walruff,* 26 Fed. Repr. 178; *Kessinger* v. *Hinkhouse,* 27 id. 883; *Bartemeyer* v. *State of Iowa,* 85 U. S. 129–133, 136; *Eberle* v.

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Michigan, 232 id. 700–706. In the instant case the relator is practically prohibited from disposing of the liquors he had on hand when chapter 521 became a law, and so the above authorities are in point. The case of *Mugler* v. *Kansas*, 123 U. S. 623, already cited, is not in conflict with these other decisions. It is a fact that one of the charges in that case was the selling of liquor which was not on hand after the act was passed, but the decision did not turn on that point, but merely on the power of the legislature to take away the license to sell liquor where no property right was involved in it, and further, the statute in question did provide for the issuance of permits for certain purposes, and the facts show that no such permit had been obtained. Nor are the authorities cited, in conflict with those holding that the fact that the value of property used as a brewery will be depreciated under the prohibition statute does not make such a statute unconstitutional. *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Mugler* v. *Kansas*, 123 id. 623. That chapter 521 is unconstitutional, in so far as it prohibits the sale of liquors on hand at the time of its enactment, is further shown by the following cases: *People ex rel. Isaacs* v. *Moran*, 206 N. Y. 670, reversing 150 App. Div. 226, on the dissenting opinion; *People ex rel. McPike* v. *Van De Carr*, 178 N. Y. 425; *People* v. *Cohen*, 91 App. Div. 89. In both the *Isaacs* and *McPike* cases just cited *Wynehamer* v. *People*, 13 N. Y. 378, was cited and approved, the court in the *McPike* case saying (p. 428): "It is settled in this state, therefore, that a statute which attempts to destroy an existing property right is void." Chapter 521 further conflicts with the Constitution in that it attempts to delegate legislative power. The legislature can no more delegate its power to repeal a law than it can to enact one, and it must follow that it

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cannot delegate its power to suspend the operation of a law, as that in effect is a repeal. This act confers an arbitrary power upon the officials named to "suspend the privileges" under liquor tax certificates already issued, or thereafter to be issued, and to "prohibit the sale of alcoholic beverages" during the whole or a part of the duration of the present war. No rule or regulation is laid down for the guidance of the officials clothed with this power. There is no limitation even upon the exercise of the power. The power granted is absolute. There is nothing to insure any uniformity of action. The officials are left to act as they deem proper. In a word, they are to legislate. Such an act cannot be upheld. *People* v. *Klinck Packing Co.*, 214 N. Y. 121–138, 140. And a statute which makes an arbitrary classification or permits others to do so is invalid. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis*, 165 id. 150–155. The statute in question does not provide for the giving of any notice to the parties to be affected. It gives them no opportunity to be heard on the question whether the suspension should be ordered. It does not comply with the provisions of the Constitution which provide that there must be due process of law. *Stuart* v. *Palmer*, 74 N. Y. 183; *Ives* v. *South Buffalo R. Co.*, 201 id. 271–293; *Matter of City of New York* (*Grand Boulevard*), 212 id. 538. The act in question seemingly does not apply to persons holding a so-called second class license, that is, a certificate authorizing the sale of liquor not to be drunk on the premises. The act apparently applies, and was intended to apply, only to the holders of so-called first class licenses, that is, those having certificates authorizing the sale of liquor to be drunk on the premises. The language of the act is quite conclusive on this point. In addition to what has already been pointed out, the act author-

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izes the officials to " order the closing of places within such limits " in which the sale of liquor has theretofore been authorized. And the act continues, that the excise commissioner " may also prescribe that the sale of alcoholic beverages, if any, within such limits, shall be exclusively to be drunk upon the premises." Those holding so-called second class licenses, such as that held by the relator, have an absolute right to sell the liquor in conjunction with the carrying on of another business. That, in fact, is what the relator has been doing, and what is done by most of the persons holding such certificates. Of course the relator's place cannot be closed. He has the right to conduct his grocery business irrespective of his right to sell liquor; so the provision that authorizes " the closing of places " can be intended to apply only to those having a certificate authorizing the sale of liquor to be drunk on the premises. This is further emphasized by the provision that permits the commissioner to prescribe that the sale of liquor in the places affected " shall be exclusively to be drunk upon the premises." He could not make any such prescription with regard to the relator's place. The relator has no certificate which authorizes such sales, and, in addition, the sale of liquor to be drunk on the premises in connection with the grocery business is expressly prohibited. Liquor Tax Law, § 20. If the act in question applies to any one other than a person having the right to sell liquors to be drunk on the premises, it must apply as well to druggists as to grocers and others. It was respondent who suggested that certiorari was not the proper remedy. While it may not be necessary to decide this question, the following references, at least, give some justification to the form of proceeding followed by the relator. *People ex rel. Loevin* v. *Griffing*, 166 App. Div. 538; *People ex rel. Browdy* v. *McDer-*

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mott, 169 id. 755; *Matter of Bracket,* 27 Hun, 605; *Matter of Nichols,* 6 Abb. N. C. 474; *Matter of Bradhurst* v. *First Great S. W. Turnpike Rd. Co.,* 16 Johns. 8, 13; *Le Roy* v. *Mayor,* 20 id. 430–438; *People* v. *Board of Assessors,* 39 N. Y. 81–88; *People ex rel. S. & U. H. R. R. Co.* v. *Betts,* 55 id. 600; *People ex rel, Dexter* v. *Mosier,* 56 Hun, 64; Liquor Tax Law, § 27. As chapter 521 of the Laws of 1917 seems clearly to be unconstitutional, the restraining order asked for is granted and the respondent is enjoined from enforcing his order pending the decision on the writ, which is allowed.

Ordered accordingly.

HORACE B. HORTON et al., Doing Business Under the Name of CHICAGO BRIDGE AND IRON WORKS, Plaintiffs, *v.* QUEENS COUNTY MACHINERY CORPORATION, INC., et al., Defendants.

(Supreme Court, Kings Special Term, August, 1917.)

Mechanic's lien — filing of — bankruptcy — priority — foreclosure — waiver.

Bankruptcy — liens — waiver.

Where three days after the completion of a building the owner became bankrupt, a notice of mechanic's lien filed by a materialman giving the name of the bankrupt as the name of the owner of the property is good.

A mechanic's lien filed within the ninety-days limit but not until the owner of the property had been adjudicated a bankrupt has priority over the claims of the trustee in bankruptcy, as the lien is created not by the act of filing it but exists at all times from the furnishing of materials or labor.

Where a mechanic's lien creditor of a bankrupt, in its proof of claim filed with the referee in bankruptcy, asserts its right to the lien, there is no waiver thereof.

Where such creditor accepted dividends from the bankrupt estate only after the trustee in bankruptcy, the creditors' committee and the defendants in an action to foreclose the lien for an unpaid balance due had stipulated in writing that the

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acceptance of such dividends should be without prejudice to plaintiffs' claim, that their lien filed was a valid one, and to their right to enforce the same for the payment of the balance due, there was no waiver of the lien.

While in bankruptcy proceedings a secured creditor is not entitled to vote at a creditors' meeting the fact that through the fault or inadvertence of the referee or trustee a creditor is permitted to vote at such meeting when his lien has been asserted in his claim as filed is no waiver of the lien.

ACTION to foreclose a mechanic's lien.

R. M. S. Putnam and Louis W. Dinkelspiel, for plaintiffs.

Arthur P. Hilton, for defendant Queens County Machinery Corporation, Inc.

CROPSEY, J. The plaintiffs seek to foreclose a mechanic's lien arising out of the furnishing of materials and labor in the construction of a building for the United States Metal Products Company. Three days after the building was completed the United States Metal Products Company filed a voluntary petition in bankruptcy. At that time plaintiffs had been paid something on account, but there was a substantial balance unpaid. Within a few days after the adjudication in bankruptcy the plaintiffs filed a mechanic's lien. Later plaintiffs filed a claim with the referee in bankruptcy, stating in their claim that they had a mechanic's lien under the Lien Law of the state. Still later trustees were appointed and subsequently sold the property in question to the defendant Queens County Machinery Corporation, Inc. The plaintiffs received dividends, but the circumstances connected with those payments will be stated later. On the trial the defendants raised three points. All facts essential to plaintiffs' recovery, except as involved in these three points, were conceded. 1. The

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defendants claim the lien is defective because it gives the name of the bankrupt as the name of the owner of the property. While this claim was made on the trial it apparently has been abandoned, for no reference is made to it in defendants' brief. It is impossible to understand what other name could have been inserted in the lien as owner. The lien was filed before the trustees were appointed, and of course it was impossible to guess who they would be. But even if they had already been appointed a lien filed stating that the owner was the bankrupt would have been perfectly good. *Gates & Co., Inc.*, v. *National Fair & Exposition Assn.*, 172 App. Div. 581–587; *Reedy Elevator Co.* v. *Monok Co.*, 171 id. 653. 2. The next question is whether a mechanic's lien, filed within ninety days after the completion of the work, but not until after the owner had been adjudged a bankrupt, has priority over the claims of the trustees of the bankrupt. While there have been decisions touching on this question, the exact point here involved apparently has not been decided since the 1910 amendment to the Bankruptcy Act. There have been decisions since that amendment holding that a mechanic's lien, filed under the circumstances existing in this case, is good when filed against public improvements, but the claim is that those authorities are not applicable. Formerly the rule was that, irrespective of bankruptcy, a mechanic's lienor was merely a creditor at large and had no rights until his lien was filed other than those of a general creditor. *Payne* v. *Wilson*, 74 N. Y. 348; *McCorkle* v. *Herrman*, 117 id. 297; *Stevens* v. *Ogden*, 130 id. 182. But since those decisions were rendered the rule has been changed. Now it is settled that such a lienor between the time of furnishing the labor or materials and the expiration of the time within which

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his lien must be filed has an equitable lien that is good against an assignee for the benefit of creditors. He has "a preferential statutory right in the nature of an unperfected equitable lien" which cannot be defeated by the voluntary act of the party against whom it might be asserted. *Kane Co.* v. *Kinney,* 174 N. Y. 69. And such a lien is good as against a trustee in bankruptcy. *Crane Co.* v. *Pneumatic Signal Co.,* 95 App. Div. 53; affd., on opinion below, *sub nom. Crane Co.* v. *Smythe,* 182 N. Y. 545. And it is also good as against a trust mortgage given for the benefit of creditors. *American Mortgage Co.* v. *Merrick Const. Co.,* 120 App. Div. 150; affd., 190 N. Y. 526. These cases all recognize that a mechanic's lien is not created by the act of filing it, but that it exists at all times from the furnishing of the materials or labor, and that the filing of the lien merely preserves it. And this right of the holder of a mechanic's lien is upheld, although he did not actually file it until after the assignment for creditors had been made or the bankruptcy adjudged or the trust mortgage executed. Whether the decisions in these cases go any further than as stated is disputed. Some of the later cases contend that they do (*Matter of Grissler,* 136 Fed. Repr. 754–756), and others that they do not. *Behrer* v. *McMillan,* 114 App. Div. 450–454, affd, *sub nom. Behrer* v. *City & Suburban Homes Co.,* 191 N. Y. 530; *Parsons* v. *Curran,* 149 App. Div. 762. But we need not discuss those claims here. It is conceded that the plaintiffs' lien would have been good against the trustee and that plaintiffs would have been entitled to foreclose it but for the amendment of 1910 made to the Bankruptcy Act. That amendment added to section 47, subdivision A2, which prescribes the "duties of trustees," the following: "And such trustees, as to all property in the custody

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or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied." This section of the Bankruptcy Act does not deal with the title of the trustee to the bankrupt's property, but only with the trustee's duties. The provisions relating to title are contained in section 70. The provisions of the amendment in question plainly deal only with the question of remedy or procedure. The reason for the adoption of this amendment and the objects sought to be accomplished by it are rather generally agreed to both by text writers and decisions. These are said to be to overcome the effect of the decisions like *York Mfg. Co.* v. *Cassell,* 201 U. S. 344, and *Matter of New York Economical Printing Co.,* 110 Fed. Repr. 514, and to enable the trustee to attack secret liens created or transfers made by bankrupts which otherwise could not be attacked. Collier Bankruptcy (9th ed.), 659–661. The opinion in the York case states that a trustee "stands simply in the shoes of the bankrupt" and cannot attack the claims of those asserting liens which would be good against the bankrupt. This statement of the rule is put perhaps rather broadly and apparently has caused the decision to be misunderstood. The decision held that a conditional bill of sale not filed was good as against a trustee in bankruptcy, although the state statute said it was void as against creditors, but this was because the courts of that state had decided that the creditors referred to in the statute meant only those who before the contract was filed had seized the property on execution or attachment.

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In other words, the *York* case merely decided that the bill of sale was good against the trustee because it would have been good in the state court against the creditors of the bankrupt. Even before the 1910 amendment a chattel mortgage or conditional sale which would not have been a valid lien as against the creditors of the bankrupt for want of record, or for other reasons, would not have been a valid lien against the bankrupt's estate. Bankruptcy Act, § 67-a. Under this provision a trustee in bankruptcy has been held to have a prior right to that of a holder of a chattel mortgage not filed, because such failure to file it made it invalid against the creditors under the state decisions. Lien Law, § 230; *Skilton* v. *Codington,* 185 N. Y. 80. This case was decided before the 1910 amendment, but it points out clearly the real ground of the decision in the *York* case. In this state a chattel mortgage not filed is void as against all creditors, although its validity can be attacked only by a creditor having obtained a judgment or lien. *Stephens* v. *Perrine,* 143 N. Y. 476. This holding is entirely different from that of the courts of the state referred to in the York decision. Under the authority of the *Skilton* case a trustee in bankruptcy in this state would not have priority over the vendee under a conditional sale not filed, because by our statute such instruments are void only against purchasers and mortgagees in good faith and not against creditors. Pers. Prop. Law, § 62. The amendment of 1910 was intended to give the trustee the status of a creditor holding a lien at the time the bankruptcy petition was filed. *Bailey* v. *Baker Ice Machine Co.,* 239 U. S. 268–275, 276; *Mergenthaler Linotype Co.* v. *Hull,* 239 Fed. Repr. 26–34. Under this amendment the trustee may elect to take the position that any creditor could have

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taken, and so has only such rights as such creditor might have had. *Matter of Seward Dredging Co.*, 242 Fed. Repr. 225–227, 228; *Matter of Calhoun Supply Co.*, 26 Am. Bank. Rep. 528. Liens valid before the amendment were not rendered invalid by it. They are valid since the amendment the same as they were before it. "There is nothing in the amendment indicating that its purpose was to prescribe a rule by which the validity or priority of such liens is to be determined or enforced. In that respect the law is left untouched, and the validity and rank of the lien is now to be ascertained by the same applicable principles as obtained prior to the change." *Matter of Lane Lumber Co.*, 217 Fed. Repr. 550, 552, citing Loveland Bankruptcy (4th ed.), § 372, and affirming 210 Fed. Repr. 82. See, also, *Dellinger* v. *Waite-Thresher Co.*, 228 Fed. Repr. 506. With this understanding of the scope and meaning of the amendment it is not surprising to find decisions holding that since that amendment a conditional sale made in New York, though not filed, is good against the trustee in bankruptcy of the vendee, because it is good here against the bankrupt's creditors. *Mergenthaler Linotype Co.* v. *Hull*, 239 Fed. Repr. 26–34. And there are a number of decisions, since the amendment, holding that even equitable liens existing at the time of bankruptcy are not cut off but may be enforced against the bankrupt's estate. *Schoenherr* v. *Van Meter*, 215 N. Y. 548–552, 553. So also a vendor's lien, given to him by the state statute, has been upheld. *Matter of Lane Lumber Co.*, 217 Fed. Repr. 550. And the same holding has been made with respect to an artisan's lien. *Matter of McAllister-Newgord Co.*, 193 Fed. Repr. 265. And the rights of a mechanic's lienor who did not file his lien until after the adjudication in bankruptcy have been upheld since the 1910 amendment. *Hildreth Granite*

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Co. v. *City of Watervliet,* 161 App. Div. 420; *Gates & Co.* v. *Stevens Construction Co.,* 220 N. Y. 38, 49, 50; *Gates & Co., Inc.,* v. *Nat. Fair & Exposition Association,* 172 App. Div. 581–590; Brandenburg Bankruptcy (1917 ed.), § 864. While the first two of these cases last cited dealt with mechanic's liens filed against public improvements, the principle underlying them is applicable to this case, in view of the decisions showing the purpose and intent of the amendment and of those construing it. Furthermore, the language of the Court of Appeals in the *Gates* case is very broad and comprehensive. It is this: "The amendment of the Bankruptcy Law was not intended to enlarge the rights of a trustee as against lienors under our statute but to enable the trustee to avoid secret and unrecorded liens created by act of the bankrupt." 220 N. Y. 38, 50. In view of this last expression of the highest court of this state the language used in *Henderson* v. *Mayer,* 225 U. S. 631, 637, though uttered before the 1910 amendment, is still applicable: "The statute was not intended to lessen rights which already existed, nor to defeat those inchoate liens given by statute of which all creditors were bound to take notice and subject to which they are presumed to have contracted when they dealt with the insolvent. Liens in favor of laborers, mechanics and contractors are of this character." The policy of the courts for many years has been to uphold, wherever possible, the rights of laborers and materialmen, and to enforce their claims. With this object in view our courts have held that a mechanic's lien, although not filed until after the assignment, was good against the assignee for creditors of a contractor, although the statute only provided that it was good against such an assignee of the "owner." Lien Law, § 13; *Kane Co.* v. *Kinney,* 174 N. Y. 69. See, also, cases

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collected in McKinney's Consolidated Laws of New York, book 32, Lien Law, bottom of p. 66, top of p. 67. And after the Court of Appeals had reaffirmed the holding that a receiver in supplementary proceedings, commenced before the filing of a mechanic's lien, had priority over the lienor (*Mulstein Co.* v. *City of New York,* 213 N. Y. 308; *McCorkle* v. *Herrman,* 117 id. 297), the legislature promptly amended section 13 of the Lien Law to overcome this decision and to give the mechanic's lienor the preference. Laws of 1916, chap. 507, § 7. Furthermore, by the same act a mechanic's lien was given priority over an attachment issued, or a money judgment recovered, upon a claim which in whole or in part was for materials furnished or labor performed or moneys advanced for the improvement of the real property in question, although such attachment or judgment was obtained before the filing of the lien. This change did not become effective till July 1, 1916, and so does not apply to this case, but it shows the trend of legislation to be for the protection of the interests of those having mechanics' liens. 3. The defendants' third contention is that the plaintiffs have waived their right to enforce their lien. This is predicated upon the contention that plaintiffs filed their claim with the bankruptcy court and accepted dividends the same as all the general creditors. Plaintiffs did file their claim, but in it asserted their right to the very lien now sought to be foreclosed. There was therefore no waiver involved in that act. They had a right to prove their claim without waiving their lien. Bankruptcy Act, § 57, subd. H; Collier Bankruptcy (9th ed.), 725. It is stated as a general rule that if a secured creditor proves his debt as an unsecured debt he thereby waives his security. Collier Bankruptcy (9th ed.), 726; *Ansonia Brass & Copper Co.* v. *Babbitt,* 74 N. Y. 395–

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403, 405; *Matter of Fisk & Robinson,* 185 Fed. Repr. 974. But here the plaintiffs did not prove their debt as an unsecured debt. On the contrary, in their proof of claim they asserted their right to their lien for security. But it is claimed that the plaintiffs voted at a meeting of the creditors on the strength of their claim that was filed. Even if this is so it does not affect their rights. While a secured creditor is not entitled to vote at a creditors' meeting, and secured claims cannot be counted in computing the number of creditors or the amounts of claims, except as to the excess of such claims over the value of the security (Bankruptcy Act, § 56, subd. B; Collier Bankruptcy [9th ed.], 701), if he is permitted to vote it is due to the fault or inadvertence of the referee or trustee, but such participation when his lien has been asserted in the claim filed is no waiver of the lien. The acceptance of dividends, especially when it follows the filing of the claim without asserting the right to a lien, is usually quite conclusive that there has been a waiver. *Matter of Fisk & Robinson,* 185 Fed. Repr. 974. But in the instant case the facts concerning the acceptance of the dividends take it without the rule. The dividends here were accepted only after the trustees in bankruptcy, the creditors' committee, and the purchaser of the property is question — the present defendants — had stipulated in writing that the acceptance of such dividends should be without prejudice to the plaintiffs' claim that their lien filed was a valid lien, and to their right to enforce that lien for the payment of the balance due. The plaintiffs have given credit for all the dividends received and seek to foreclose only for the balance unpaid. There was plainly no waiver of the plaintiffs' rights under these circumstances. Everybody interested in the estate of the bankrupt agreed that the

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acceptance of the dividends should in no way defeat the plaintiffs' assertion of right to enforce their lien. Plaintiffs are entitled to judgment, with costs.

Judgment for plaintiffs, with costs.

Matter of the Application of ALBANY SYNDICATE for a Writ of Mandamus against DELMAR RUNKLE, as County Treasurer of the County of Rensselaer, N. Y.

(Supreme Court, Albany Special Term, August, 1917.)

Mandamus — when peremptory writ allowed — tax sales in Rensselaer county — city of Troy — county treasurers — real property — Tax Law, §§ 122, 157, 160.

The court in awarding a peremptory writ of mandamus will mould it according to the just rights of all the parties, and where the petition sets forth a substantial right the proceeding will not fail because the relator asks too much or mistakes to some extent the relief to which he is entitled.

By virtue of section 160 of the Tax Law (Laws of 1909, chap. 62) the provisions of articles 6 and 7 thereof do not affect any law relating to the sale of real estate for taxes in the city of Troy and the special statutory provisions under which county treasurers have conducted their tax sales in Rensselaer county are still in force so far as the city of Troy is concerned and as to such sale a county treasurer is not required to give the notice to the comptroller required by section 157 of the Tax Law.

The special statutory provisions relating to sales for taxes in the county of Rensselaer outside of the city of Troy having been repealed by implication by chapter 908 of the Laws of 1896, as to such sales the county treasurer is required to give the notice to the state comptroller called for by section 157 of the Tax Law and to conduct the sale under the provisions of section 122 thereof.

A peremptory writ of mandamus allowed as to certain tax sales in all of the county of Rensselaer outside of the city of

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Troy, including the city of Rensselaer created by chapter 359 of the Laws of 1897, and denied as to tax sales in the city of Troy.

APPLICATION for peremptory writ of mandamus.

Du Bois & McDermott, for relator.

Herbert F. Roy, for respondent.

NICHOLS, J. The relator is a domestic corporation engaged in the business of the purchase of real estate and liens thereon, and since the year 1911 has extensively engaged in the business of buying parcels of land sold, by the county treasurer of Rensselaer and other counties in the state of New York, for the non-payment of taxes, levied and charged against such parcels and has purchased certain tax liens or conveyances for terms of years for which they were issued, sold by the county treasurer of Rensselaer county for the non-payment of taxes levied and charged against such parcels and is the owner in fee simple of various parcels of land in the city of Rensselaer and the towns and county of Rensselaer.

The respondent is the county treasurer of the county of Rensselaer.

The county of Rensselaer contains the city of Troy, a second class city, the city of Rensselaer, a third class city, and several towns.

The several county treasurers of the county of Rensselaer, subsequently to the passage and taking effect of chapter 236 of the Laws of 1860, as amended by chapter 321 of the Laws of 1866, have conducted sales of parcels of real estate situated in the said city of Troy and in the residue of Rensselaer county for the non-payment of said state and county taxes charged against said real estate, each parcel being sold for the lowest term of years at which any person

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offered to take the same in consideration of advancing the sum necessary to discharge the taxes, interest and charges which were at the time of sale of said property then due, in conformity to the provisions of said chapter 236 of the Laws of 1860, as amended by chapter 281 of the Laws of 1874, which acts applied solely to the county of Rensselaer, and certificates were issued to such bidders in the form prescribed by said special acts, stating the term of years for which said parcels were sold and upon the non-redemption of said parcels, after compliance by the purchaser with the regulations of said treasurer and with the statute, tax leases for the term of years for which said parcels were sold were delivered to said purchaser; said practices continued since the passage of chapter 908 of the Laws of 1896, known as the Tax Law, down to the present time.

The respondent and his predecessors in office since 1896 have omitted to submit within the time prescribed in section 157 of the Tax Law to the state comptroller an accurate and complete list of all the lands in the county of Rensselaer to be advertised for tax sale by him and have conducted the tax sales without having submitted such lists, and on July 16, 1917, the relator made a written demand upon the respondent to prepare and transmit to the state comptroller the tax list mentioned in section 157 of the Tax Law and that the respondent at such sales conduct the same under the provisions of section 122 of the Tax Law and sell so much of each parcel described in the list and approved by the comptroller as will be sufficient to pay the taxes thereon, and for which the sale will be made, and upon the refusal of the respondent to conduct the said tax sales in conformity with the provisions of the Tax Law makes application for this peremptory writ of mandamus.

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At the outset the court holds that the provisions of articles 6 and 7 of the Tax Law do not apply to the city of Troy. By section 160 of the present Tax Law which forms the last section of article 7 of the Tax Law it is provided: "This or the preceding article shall not affect any law relating to the sale of real estate for taxes in any city." The present Tax Law constitutes chapter 62 of the Laws of 1909 and expressly repealed the former Tax Law which was chapter 908 of the Laws of 1896, and section 158 of the former Tax Law, which was a part of article 7 thereof, provided in exactly the same language that the provisions of said act should not affect any law relating to the sale of real estate for taxes in any city. In *Matter of Troy Press Co.*, 187 N. Y. 285, the court says: "The provisions of the General Tax Law pertain to the sale and redemption of lands in the county outside of the city." And in the case of *Carroll* v. *McArdle*, 157 App. Div. 406, the Appellate Division in the second department says: "The provisions for a sale of land for unpaid taxes which are the subject of this litigation appear in article 6, and the only exception from its provisions is contained in section 158, which is in article 7, and which provides: 'This or the preceding article shall not affect any law relating to the sale of real estate for taxes in any city.' This section relates specifically to the provisions of the law covering the sale of lands for taxes, and by excluding cities only from its operation the intent of the Legislature to include all towns in the State seems to be manifest." Therefore, the provisions of the special acts under which the county treasurers have conducted their tax sales in Rensselaer county are, as far as the city of Troy is concerned, still in force and are not repealed by implication or superseded by

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the provisions of chapter 908 of the Laws of 1896, known as the Tax Law, nor did the provisions of chapter 182 of the Laws of 1898, which by section 308 only apply to sales for city taxes or assessments for local improvements upon real estate, and the addition of a new section, 313, added by the amendment of chapter 581 of the Laws of 1899 providing how the notices for tax sales for unpaid state and county taxes should be published and providing how the notices of redemption be published, repeal by implication or affect tax sales held in the city of Troy, except as to the newspapers in which such tax sales and notices of redemption are required to be published pursuant to the decision of the Court of Appeals in *Matter of Troy Press Co., supra.*

The city of Rensselaer was created by chapter 359 of the Laws of 1897, being subsequent to the enactment of chapter 908 of the Laws of 1896. The statutes in relation to the sale of real property in the city of Rensselaer for unpaid taxes are the same as those in force for Rensselaer county, outside of the city of Troy.

This court holds upon the authority of the Court of Appeals in *Matter of Troy Press Co., supra* (cited and approved in *Peterson* v. *Martino,* 210 N. Y. 417), that the provisions of the General Tax Law pertain to the sale and redemption of lands in the county of Rensselaer outside of the city of Troy.

Therefore, we have this situation that tax sales of real property in the city of Troy must be made by the county treasurer under the provisions of the special acts heretofore referred to, that as to such sales the said county treasurer is not required to give the notice to the comptroller required by section 157 of the Tax Law, and that such sales shall be for the

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lowest term of years that any person will bid for the same, and certificates are to be issued to such bidder in the forms prescribed by the said special acts. That as to real property sold for taxes in the county of Rensselaer outside of the city of Troy the provisions of the special acts have been repealed by implication by chapter 908 of the Laws of 1896 and that as to such sales the county treasurer is required to give the notice to the state comptroller called for by section 157 of the Tax Law and to conduct the sale under the provisions of section 122 of the Tax Law, selling so much of each parcel as will be sufficient to pay the taxes thereon for the years the taxes of which said sales shall be made, with the interest and charges thereon, and in case of non-redemption thereof to execute to the purchaser the conveyance provided by section 154 of the Tax Law; in other words to conduct such sales under the provisions of articles 7 and 8 of the Tax Law.

The relator having set out a substantial right in the petition, the proceeding will not fail because the relator asks for too much or mistakes to some extent the relief to which he is entitled. The court in awarding the peremptory writ will mould it according to the just rights of all the parties. *People ex rel. Keene* v. *Supervisors,* 142 N. Y. 278.

For these reasons the peremptory writ of mandamus applied for must be allowed as to tax sales in all of the county of Rensselaer outside of the city of Troy, including the city of Rensselaer, and denied as to tax sales in the city of Troy. No costs are allowed.

Ordered accordingly.

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OLIVER R. McKENZIE, Plaintiff, *v.* HENRY V. WOODWARD, as Administrator, etc., et al., Defendants.

(Supreme Court, Monroe Special Term, August, 1917.)

Partition — action for — title — affidavits — service by publication — jurisdiction — judicial sales.

A purchaser at a partition sale who refuses to complete his purchase is required to point out the defect relied upon in the title and if it depends upon an impossible or remote contingency or upon the construction of inconsistent, conflicting or ambiguous statements in the affidavits on an application for an order for service by publication the court will disregard the defect and will give the statements in the affidavits such a construction if possible as will sustain the proceedings.

Where jurisdiction to issue an order for service of a summons upon unknown defendants by publication depends upon the construction to be given to conflicting, inconsistent or ambiguous statements in the affidavits upon which the application for the order was made, the supplemental summons bringing in unknown defendants and the complaint in the action will be examined to ascertain the theory of the application for the order and the intention of the plaintiff and a construction of these statements in the affidavits will be adopted if possible which will sustain the proceedings rather than one which will invalidate them.

MOTION to compel the purchaser at a partition sale to complete his purchase.

Henry V. Woodward, for plaintiff, for the motion.

Andrew E. Tuck, for purchaser, opposed.

RODENBECK, J. 1. The purchaser at a judicial sale attacking a title has the burden of showing facts which impair the title (*Greenblatt* v. *Hermann,* 144 N. Y. 13; *Seitz* v. *Messerschmitt,* 117 App. Div. 401, 407; *Hagan* v. *Drucker,* 90 id. 28; *Goodwin* v. *Crooks,* 33 Misc. Rep. 39), and where the validity of

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the title depends on an impossible or remote contingency the court will compel specific performance. *Ferry* v. *Sampson,* 112 N. Y. 415; *Cambrelleng* v. *Purton,* 125 id. 617; *Hamershlag* v. *Duryea,* 58 App. Div. 288; *Empire Realty Corp.* v. *Sayre,* 107 id. 415; *Seitz* v. *Messerschmitt, supra.* If the defect relied upon is based upon the construction to be given to inconsistent, conflicting or ambiguous statements in affidavits on an application for an order for service by publication the court will give the statements in the affidavits such a construction, if possible, as will sustain the proceedings.

2. Following these rules the order for service by publication in this case should be sustained and the purchaser upon the partition sale should be required to complete his purchase. The only question involved on this motion is whether or not the affidavits upon which the order for publication was made against unknown defendants were sufficient to confer jurisdiction. The Code provides that a summons may be served by publication where the defendant remains unknown to the plaintiff after the latter has made diligent inquiry. Code Civ. Pro. § 438, subd. 1. While the action was pending one of the defendants died and the plaintiff sought to bring in as unknown heirs the parties who would be entitled to inherit her share of the real estate and obtained an order for service by publication. The action proceeded to judgment and sale and the purchaser now refuses to complete the purchase on the ground that the affidavits upon which the order for service by publication was made show that the defendant died intestate without leaving any persons entitled to inherit her interest in the real estate in which event her interest escheated to the state which should have been made a party defendant.

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The objection is not well taken. After the death of the defendant the plaintiff first moved to amend his complaint and for that purpose obtained an order permitting him to file a supplemental complaint. Upon this order a supplemental complaint was filed and served in which it was alleged that the persons who were entitled to inherit under the deceased defendant were "unknown" to the plaintiff and a demand was made that their interest be ascertained and determined. The court upon motion also ordered that a supplemental summons be issued to include persons "unknown" who may have an interest in the real estate of which the deceased defendant died seized. Thereupon an application was made for an order for service by publication upon affidavits in which order it was recited that the deceased defendant had left "no known heirs at law or next of kin whatsoever" and service of the supplemental summons was directed to be made upon the parties as "unknown" who would be entitled to inherit from the deceased defendant. One of the affidavits upon which this order was made recited that the deceased defendant had told the affiant that "she had no living heirs at law or next of kin, that she had no relatives of any kind." Another affiant stated that the deceased defendant informed him that "she had no husband, father, mother, brothers or sisters living and that she had no next of kin, relatives or antecedents whatever." Still another affiant said that he had been informed that the deceased defendant was "all alone in the world." The affidavit of the attorney of record for the plaintiff states that the deceased defendant died leaving no "known" heirs at law or next of kin whatsoever so far as he had been able to ascertain and recited the issuance of the supplemental summons

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and complaint and the designation of the persons entitled to inherit the interest of the deceased defendant as " unknown " and that after the exercise of due diligence he would be unable to learn the names of any of said " unknown " defendants. He refers to the affidavits of the other deponents as evidence that the deceased defendant died " leaving no known heirs at law or next of kin or relatives of any kind whatsoever."

The expressions used in these affidavits must be construed in connection with the supplemental summons and complaint to ascertain whether the information which the plaintiff was seeking to convey to the court was intended to establish that the defendant died without leaving any persons entitled to inherit her interest in the real estate or that she died leaving persons entitled to inherit whose names were " unknown " to the plaintiff. The theory upon which the supplemental summons and complaint were issued was that the defendant died leaving persons entitled to inherit but that they were unknown to the plaintiff and this is what the affidavits upon the application for the order for service by publication sought to convey and not that she died without leaving any persons entitled to inherit her interest in the real estate. If she had so died her interest in the property would have escheated to the state and the state would have been a proper and necessary party defendant, but a fair construction of the affidavits is that the statements made in them were not intended to establish the fact that she had died without leaving any persons entitled to inherit her interest in the property but that the names of such persons if any were " unknown " to the plaintiff. Plaintiff was required to show that he had made diligent inquiry to

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ascertain the names of the persons entitled to inherit from the deceased defendant and the affidavits presented on the motion for the order for service by publication were intended for that purpose. They were sufficient to satisfy the court that there were unknown defendants and that reasonable inquiry had been made to ascertain their names and that is all that was required. That the affidavits were so understood by the court to whom the application was made is shown by the direction to serve the supplemental summons upon the " unknown " persons who might have an interest in the real estate of which the deceased defendant died seized. The supplemental summons and complaint and the subsequent proceedings show that the action proceeded after the death of the defendant upon the theory that there were unknown persons entitled to inherit her interest in the property whose names plaintiff was unable to ascertain after diligent inquiry. This was the proper procedure in view of the presumption that every person is presumed to die leaving heirs. *Seitz* v. *Messerschmitt, supra,* and cases cited. Where jurisdiction to issue an order for service of a summons upon unknown defendants by publication depends upon the construction to be given to conflicting, inconsistent or ambiguous facts in the affidavits upon which the application for the order was made, the supplemental summons bringing in unknown defendants and the complaint in the action will be examined to ascertain the theory of the application for the order and the intention of the plaintiff and a construction of these statements in the affidavits will be adopted if possible which will sustain the proceedings rather than one which will invalidate them.

Motion granted without costs.

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GRAND UNION TEA COMPANY, Plaintiff, *v.* JOHN N. POTTER and CHARLES H. MASON, Defendants.

(Supreme Court, Monroe Special Term, August, 1917.)

Sureties — when released — contracts — default.

A surety without notice will be released from his obligation to meet a deficiency under a contract of employment to sell and deliver merchandise where the contract without his knowledge has been modified in a substantial respect, or where it has been terminated and subsequently renewed without the consent of the surety and the default occurred during the renewal period.

ACTION to recover for a default under an employment contract.

The defendant John N. Potter entered into an employment contract with the plaintiff, the Grand Union Tea Company, and the defendant Charles H. Mason became the surety on a bond guaranteeing the faithful performance of the contract. The contract contained the following clause: "It is understood and agreed that second party shall solicit orders for merchandise at prices and premium rates fixed by first party and in such manner as first party may designate, and enter upon cards or books furnished by first party, the names and addresses of the customers and the goods ordered by each, that first party will thereupon, in due course, deliver the merchandise, premiums and premium checks so ordered, to second party, who shall thereupon, in due course, deliver the same to the customers for cash and in no other manner, and that he will within ten (10) days after each delivery to him of such merchandise, premiums and premium checks and also on the last day of each month pay first party for all merchandise delivered by him less

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the compensation to which he is entitled and account for all merchandise not delivered by him and all premiums and premium checks received by him."

The bond signed by the defendant Mason provided that "In case of a default of said Potter for thirty days written notice thereof is to be given said Mason thereof."

Defendant Potter did not account as provided in his contract. He reported the amount of all goods on hand but did not send in the cash for all the goods which had been sold. The deficiency however was wiped out on the books of the plaintiff from moneys which he paid in the following month and it is claimed that his default was thereby avoided and notice to the defendant Mason was rendered unnecessary. There was also a period of a week when he was employed by some one else and then returned to the employment of the plaintiff. This interruption in his employment it is claimed operated as a release of the surety from any default occurring subsequently. It was also claimed that he had been permitted to retain funds which under the contract he was required to turn over to the company thus modifying the contract.

Edward Lynn, for plaintiff.

Carnahan, Adams, Jameson & Pierce (George A. Carnahan of counsel), for defendant Mason.

RODENBECK, J. The defendant Mason is not liable. The contract, the performance of which he guaranteed, was not observed by the parties to it. Such a contract must be strictly performed to hold the surety. The parties may modify it and bind themselves but they thereby release the surety. In this instance the defendant Potter was permitted to withhold funds or

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extend credit to his customers and credit was extended to him by the plaintiff, all of which were contrary to the terms of the contract. He was to sell for cash and was to account within ten days of the delivery of merchandise to him and at the end of the month for all merchandise delivered by him. Had these provisions been observed the defaults sued on would not have occurred. Instead of requiring their performance the plaintiff permitted Potter to withhold funds or sell on credit and did not require payment by him in cash but extended credit to him. By so doing it modified the contract guaranteed and substituted a new contract under which the defendant Mason was not obligated. This modification occurred in May, 1914, and operated to cause the default sued on which it is claimed occurred in August, 1915, one year and three months thereafter. But prior to May, the time when the first default occurred, the plaintiff and Potter had terminated their contract and Mason's obligations came to an end. His suretyship could not be renewed thereafter without his consent. The employment of Potter for a week elsewhere operated to terminate his contract with plaintiff and relieved Mason from further liability on his bond. After this termination the plaintiff and Potter renewed their contract upon the same terms and thereafter the default occurred. At the end of May, 1914, he failed to pay for goods sold and delivered to the amount of $67.63. He was then in default having either extended credit to customers to that amount or having appropriated that much money belonging to plaintiff. In order to hold his surety plaintiff should have required him to meet the deficiency at once and in default of so doing for thirty days it should have given written notice to Mason. It did neither, but shipped goods

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to Potter in June and applied his payments that month on the deficiency of the preceding month. This it had no right to do. It did not so stipulate in the contract and, while such a course might be proper as between the plaintiff and Potter, it could not be taken without Mason's consent and bind him. Each month's business stands by itself under the contract and payments for merchandise shipped to Potter in June could not be applied to make up a deficiency in May. That payments for June shipments were so used is shown by the fact that the deliveries to him in June amounted to $239.62 and the payments to $215.47 so that payments for merchandise delivered to him in June must have been applied to the May shortage. It is evident that within thirty days after Potter's default at the end of May he did not make good his default by payments independent of those due on the June account. Potter should have been required in June not only to account for all sales and deliveries during the month of June but to pay the deficiency of May of $67.63 beside, and if he did not so do Mason should have been notified. The failure to so notify him relieves him from any obligation for the alleged deficiency in August, 1915. This method of doing business was continued under the contract and the defaults of Potter amounting in 1914 for June to $40.09; August, $14.23; September, $25.98; October, $38.26; November, $78.67; December, $70; in 1915 for January, $95.57; February, $121.94; March, $133.67; April, $132.03; May, $139.10; June, $164.17; July, $213.40 and August, $229.75 were all covered up and were not called to Mason's attention until August, 1915, when he was notified of the default for the first time. That the alleged deficiency of $232.55 for August was not in fact for that month is shown by

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the ledger account which charged Potter with a deficiency for July of $213.40 and shows that $159.96 worth of goods were delivered to him in August while he paid $205.39 during that month. Parties to a contract cannot modify it in this manner and manipulate their accounts and hold a surety on the original contract. They must exercise the utmost good faith toward the surety and strictly observe their contract with each other and with him or he will be relieved. The suretyship is for a particular contract and if that is not observed, but another substituted in its place, the surety is relieved. A surety therefore without notice will be released from his obligation to meet a deficiency under a contract of employment to sell and deliver merchandise where the contract has been modified without his knowledge in a substantial manner affecting the deficiency by permitting the employee to withhold funds which the contract required him to pay over at stated periods, where credit has been extended to the employee where cash payments were required under the contract and where the contract had been terminated and subsequently renewed without the consent of the surety and the default occurred during the renewal period. *Westcott* v. *Fidelity & Deposit Co.*, 87 App. Div. 497; *Gamble* v. *Cuneo*, 21 id. 413; *De Camp* v. *Bullard*, 22 Misc. Rep. 441; *Walsh* v. *Bailee*, 10 Johns. 180; *Moore* v. *Cockcroft*, 4 Duer, 133; *Miller* v. *Herlich*, 5 N. Y. St. Repr. 909; *Schuyler* v. *Englert*, 62 How. Pr. 479; 32 Cyc. 73, 109; 39 id. 679.

Ordered accordingly.

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CARTHAGE DEVELOPMENT CO., INC., Plaintiff, *v.* FRANK L. CUSHMAN et al., Defendants.

(Supreme Court, Monroe Equity Term, August, 1917.)

Wills — probate of — action to compel determination of title — evidence — jurisdiction — statutes — surrogates.

Upon the day of the probate of an instrument purporting to be a last will and testament by which the alleged testator devised certain real property in equal shares to A and B, two of his four surviving brothers, who were his only heirs and next of kin, each of three of them conveyed an undivided one-fourth of the property to A who immediately entered into possession and together with his heirs and assigns have ever since continued in the actual and undisputed possession of the property under claim of title. In an action to compel a determination of the title brought upon the theory that the probate of the will was without jurisdiction and without proof of a compliance of the requirements of the statute, plaintiff, who holds the title through A, contended that the will was ineffectual for the conveyance of the real estate and that in consequence it descended to all the brothers of the alleged testator as by intestacy. *Held*, that plaintiff was entitled to attack the alleged will and its probate.

That as it affirmatively appeared from the record of the alleged probate of the alleged will that there was no sworn evidence before the surrogate of the execution of the instrument in the manner prescribed by statute, nor evidence sufficient to invest him with jurisdiction to admit it to probate, the presumption of the decree of probate was rebutted, and as a result A inherited an undivided one-quarter of the premises in question and by the conveyances from his brothers acquired full and complete title to the other three-quarters thereof, and having thereafter held the same for more than twenty years under open and undisputed claim of title the ownership of plaintiff, claiming under A, was indefeasible and no interest therein vested in one who claimed that B, to whom he stood in succession, took one-half of the premises under the alleged will and having conveyed only an undivided one-fourth thereof

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ownership of the remaining one-fourth was vested in him and demanded judgment to that effect.

That the failure of proof before the surrogate of the due execution of the will in the manner required by statute could not be cured by an admission of the testator's brothers, signed and duly acknowledged but not sworn to, in which it was conceded that the facts which they declined to testify to under oath did in fact exist.

ACTION for the construction of a will.

Carnahan, Adams, Jameson & Pierce, for plaintiff.

Frederic G. Rita, for defendants.

SAWYER, J. Charles Moulson died in the year 1870, leaving him surviving four brothers, Robert W. Moulson, George Moulson, Thomas Moulson and Samuel Moulson, who were his only heirs and next of kin. On June 7, 1871, an instrument purporting to be his last will and testament was admitted to probate by the surrogate of Monroe county, in and by which the real estate, here in controversy, together with other property of decedent was devised unto the brothers Robert W. Moulson and George Moulson, share and share alike. That same day Robert W. Moulson, Thomas Moulson and Samuel Moulson each conveyed an undivided one-fourth of the premises to the said George Moulson, who immediately entered into possession and, together with his heirs and assigns, has ever since continued in the actual and undisputed possession thereof under claim of title.

It is now said by the defendant Frank L. Cushman, that Robert W. Moulson to whom he stands in succession took one-half of the premises under the alleged will, and, having conveyed away only an undivided one-fourth thereof, ownership of the remaining one-

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fourth is vested in him, and judgment to that effect is demanded by him.

Plaintiff's theory is, that the probate of such last will and testament was had without jurisdiction and without proof that same complied with the requirements of the statute, and that same was therefore ineffectual for the conveyance of real estate. That, in consequence, the real property descended to the four brothers, share and share alike as by intestacy, and the deeds mentioned together with the one-fourth he acquired by inheritance established in George Moulson absolute title to all the premises. Plaintiff, who holds title through the said George Moulson, is entitled to here attack such will and its probate. *Matter of Kellum,* 50 N. Y. 298; *Hoyt* v. *Hoyt,* 112 id. 493–504; *Dater* v. *Willson,* 36 Hun, 546; *Matter of Davis,* 59 Misc. Rep. 310.

At the time of the execution of the alleged will (September 1, 1866), and at the time of its probate in June, 1871, the requirements for the valid execution of a will and for the procedure for its probate were, substantially, the same as they are now. Laws of 1837, chap. 460, §§ 10, 11, 17.

The will must have been subscribed by the testator in the presence of each of at least two witnesses, or must have been acknowledged by him to have been subscribed to each of such attesting witnesses, or to such of them as were not present at the making of the subscription, at the time of making such subscription, or at the time of acknowledging the same, or both as the case might be, the testator must have declared in the presence of each witness that the instrument was his will, whereupon, each of the attesting witnesses must have signed his name as a witness thereto, at the end of the will and at the request of the testator.

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The procedure of probate required the surrogate to cause the witnesses to be examined before him; that all such proofs and examinations be reduced to writing; that at least two of the witnesses of such will, if so many were living in the state, of sound mind and not disabled from age or sickness, or infirmity, be produced and examined; that the surrogate inquire particularly into the facts and circumstances before establishing the same, or granting letters testamentary, or of administration. There is a further provision, that no will shall be admitted to probate until such witnesses have been examined and before "admitting the same to probate the surrogate shall be satisfied of its genuineness and validity."

This entire scheme of probate procedure contemplates that a decree admitting a will to probate shall be based only upon sworn testimony of sufficient weight and value to satisfy the surrogate of the genuineness and validity of the instrument propounded. No substitute or alterative for such procedure is provided, either in terms or by implication. It is well settled law that a surrogate's court is of limited jurisdiction and can only act as provided by statute, and it follows that an effective decree of probate can only be founded upon facts arrived at in the statutory manner.

The record of the probate of this alleged will shows, upon its face, that the paper was never declared by Mr. Moulson to be his last will and testament, nor published by him as such; neither is there any proof that the witnesses saw it signed nor that he acknowledged to either of them the signature appended thereto. In other words, it affirmatively appears there was no sworn evidence before the surrogate of the execution of the will in the manner required by

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statute, nor evidence sufficient to invest him with jurisdiction for its probate. This failure of proof was attempted to be cured by an admission of the brothers of Mr. Moulson, signed and duly acknowledged but not sworn to, in which it was conceded that the facts which the witnesses declined to testify to under oath did, in fact, exist, and the learned surrogate evidently considering this admission as sufficient to cure the failure of proof accepted it for that purpose and decreed probate thereon.

I think this entirely unwarranted. As has been said, he could only acquire jurisdiction and perform his official duties by strict conformity to his governing statutes and, under circumstances such as are here portrayed, the presumptive value of his decree of probate, so far as same relates to real estate, is completely rebutted by the record of his failure so to do. That the four brothers of Mr. Moulson understood this thoroughly is evidenced by their practical construction of their rights and adjustment in accordance therewith. Whatever may have been their reason for uniting in the unsworn admission filed with the surrogate, it is evident they believed the will and its probate a nullity, and that the property did not pass under the will to Robert and George, but by intestacy to the four of them in equal shares.

This construction of their rights and interests was in accord with the facts and the law. The record of probate rebuts the presumption of the decree and as a result Mr. George Moulson inherited an undivided one-quarter of the premises in question, and by said deeds of June 7, 1871, acquired full and complete title to the other undivided three-quarters thereof. He having thereafter held same for more than twenty years under open and undisputed claim of title thereto,

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the ownership of this plaintiff claiming under him is indefeasible, and no interest therein is vested in the defendant Cushman.

Judgment is directed for plaintiff accordingly, with costs.

Judgment accordingly.

ADDISON M. SHERMAN, Plaintiff, *v.* RICHMOND HOSE CO. No. 2, BANKERS' TRUST COMPANY of Buffalo, N. Y., as Administrator with the Will Annexed of ADELAIDE RICHMOND KENNY, Deceased, EDWARD C. ATWATER, ALICE ATWATER HICKOX, FRANCES ATWATER CLAPP, and WILLIAM L. ATWATER, Defendants.

(Supreme Court, Erie Trial Term, August, 1917.)

Legacies — lapsed — gifts — vesting — wills — title.
Wills — provisions of — legacy — vesting — gifts — title.

A lapsed legacy is one which has never vested or taken effect and has been defined as one which originally valid afterward fails because the capacity or willingness of the donee to take had ceased to exist before he obtained a vested interest in the gift.

A condition subsequent annexed to a legacy will not upon breach operate to divest title of the legatee unless there is an express gift over on breach of the condition.

If such a condition be possible of performance at the time of its imposition, and it afterward, either by act of God or operation of law, becomes impossible of performance, the estate of the grantee being once vested is not thereby divested.

A will provided that a bequest of a certain sum to a hose company should be kept at all times intact and the income devoted to the reasonable and proper uses of the legatee for whatever purposes its members acting as an organization might see fit to direct, and the will further provided that if for any reason the legacy should lapse, or fail, or for any cause not take effect, in whole or in part, the legacy should go to another. The hose company was in existence at the time of the death

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of the testatrix. *Held,* that the legacy became vested and neither lapsed nor failed because by an act of the legislature the hose company was thereafter deprived of power to use the fund for fire fighting purposes.

The gift of the income of the fund having been made with no conflicting disposition of the corpus thereof the members of the hose company in the circumstances took title to the same.

ACTION for the construction of a will.

Hamilton Ward and Irving W. Cole, for plaintiff.

Kenefick, Cooke, Mitchell & Bass, for defendant administrator.

William H. Coon and Carlos C. Alden, for Richmond Hose Co.

Edward A. Washburn, for defendants Atwater, Hickox and Clapp.

BROWN, J. On January 28, 1904, Adelaide R. Kenny made and executed her last will and testament, which was probated March 20, 1905, in and by which instrument she devised and bequeathed property of the value of upwards of $2,000,000. Thirty legacies aggregating $259,000 were given to church societies, colleges, hospitals, schools, a cemetery association, Christian associations, a board of education and a hose company. Eighteen of these legacies, aggregating $145,000, were given to be kept intact, the income from investment of the principal to be used for the purposes of the society, corporation or association, six of them, aggregating $108,000, were given to be used by the legatees for specified purposes, and six of them, aggregating $6,000, were given outright without condition or specified purpose.

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The 30th clause or paragraph of the will reads as follows: "To Richmond Hose Company No. 2, of Batavia, I give and bequeath ten thousand dollars, to be kept at all times intact, and the income derived from the safe and judicious investment thereof to be devoted to the reasonable and proper uses of said company, for whatever purposes its members, acting as an organization, may see fit to direct."

Richmond Hose Company No. 2 was organized as an unincorporated volunteer fire company of the village of Batavia in 1865 named for and in honor of Dean Richmond, a prominent citizen of that village, who died in 1866. In 1883 this fire company organized as a corporation under the same name and continued as a volunteer fire company for the purpose of taking part in the prevention and extinguishment of fires in the village and generally for the purpose specified in the statutes under which it was incorporated, having its headquarters, rooms and offices in a hose house owned and provided for its use by the village. Its membership consists of forty-four men, residents of Batavia, from thirty-five to fifty-nine years of age. Thirty-five of them were members of the company on the date of the execution of said last will and testament.

The testatrix visited the headquarters and hose rooms of the company on many occasions, purchased carpets and furniture for it, inspected its premises, attended at least three of its annual concerts and balls, made annual presents of money — $300 at one time to assist in the purchase of an exhibition hose cart — and furnished flowers from her green house and grounds each year for the decoration of the company's rooms and parade cart. The hose company had an enlarged photograph of Dean Richmond upon the wall

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of its quarters, and a like but smaller picture on the fly leaf of its constitution and on the top of its letter heads, all of which were seen and known of by testatrix. The hose company sent testatrix a bouquet of flowers each year and annually placed a wreath or bouquet on the tomb of her father, Dean Richmond. At the request of testatrix committees of the hose company visited her and her mother for many years, and brought to their attention the needs and condition of the company.

The legacy of $10,000 was paid to the hose company in 1906, was invested by the company and the income has been used for its purposes of either a business or social nature.

On January 1, 1915, the village of Batavia became a city under chapter 354 of the Laws of 1914; the volunteer fire department of the village went out of existence, and a paid fire department was substituted by act of the legislature. By this act Richmond Hose Company No. 2 was disbanded, and by resolution of the common council of the village it was obliged to and did retire from its fire headquarters, rooms and offices. The object of its organization no longer existed; it had no further business relative to the suppression or extinguishment of fires in Batavia. It went out of business for all purposes for which it was created, preserving solely its legal entity; it sold off all of its effects except such invested $10,000, and on May 23, 1916, presented to this court a petition praying for its dissolution and for a division of its assets, including such invested $10,000, among its members. An order to show cause, returnable July 10, 1916, was granted and published, and on the return of that order the proceedings were stayed pending the determination of plaintiff's claim to such legacy.

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By the 34th clause of the will it is provided: "If for any reason the legacies contained in this will to any of the church societies, to the Young Men's Christian Association, The Woman's Hospital Association, The Trustees of Union Free School District Number Ten of the town of Batavia, The Batavia Cemetery Association, Richmond Hose Co. No. 2, or the bequest of six thousand dollars to the Holland Purchase Historical Society, or any one or more of said legacies, shall lapse or fail, or for any cause not take effect in whole or in part, I give and bequeath the amounts which shall lapse or not take effect to Reverend Addison M. Sherman and Edward W. Atwater, of Batavia, New York, or to the survivor in case one of them should die before me. In the use of the same I am satisfied that they would follow what they believe to be my wishes as derived from this will. I impose upon them, however, no conditions, leaving the same to them absolutely and without condition or restriction."

The plaintiff contends that the Richmond Hose Company No. 2 having disbanded, the purposes of its organization as a fire fighting part of the municipality under the statute have ceased; that it no longer can carry on the purposes or execute the functions of its creation; that the income from the $10,000 can no longer be used as directed in the 30th clause of the will; that the legacy to the hose company has lapsed, failed and not taken effect in whole or in part, and that under the 34th clause of the will the $10,000 in the possession of the hose company was bequeathed to the plaintiff. The plaintiff contends that the legacy to the hose company did take effect in 1906 on the death of the testatrix, that it did not lapse or fail prior to her death, that it was in full effect for ten

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years during the legal life of the hose company, but that when the fire fighting purposes of the hose company ceased the legacy ceased to have effect; that it then failed and became a lapsed legacy within the terms of the will. Such contention is based upon the claim that the will does not speak of lapse, fail and not take effect as of the date of the death of the testatrix, but as of the date when the legislature took from the hose company the power to use the fund for fire fighting purposes. An examination of the will quite satisfactorily leads to the conclusion that in some instances there could be no lapse, failing or not taking effect of legacies after the death of the testatrix. There are six legacies given to six church societies that are absolute, without condition, and without advice or the expression of even a wish as to how the moneys should be used. The 34th clause provides that if any of these six legacies to church societies shall lapse or fail, or for any cause shall not take effect, the amount which shall lapse or not take effect is bequeathed to the plaintiff, etc. It is a legal certainty that none of these six legacies could lapse, fail or not take effect after the probate of the will. There could be a lapse, failure or not taking effect of any of these legacies only by reason of some condition existing at the death of the testatrix. The lapsing, failing or not taking effect of any one of these six legacies is legally certain to be dependent upon conditions existing at the death of the testatrix, and not upon something happening thereafter. It seems to be conceded by every party to this action that the legacy to the hose company did not lapse, fail or not take effect on the death of the testatrix; they all concede that the legacy vested, did wholly take effect at that time, and that for ten years it has not been a

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lapsed or failed legacy or a legacy that has not taken effect. The plaintiff asserts that as a result of the want of legal power on the part of the hose company to continue the purposes of its organization the legacy ceased to continue to take effect, and that hence the gift over to the plaintiff becomes operative and the hose company loses the legacy. The difficulty with that argument is that the will does not provide that when the legacy *ceases* to be used for hose company purposes it shall go to the plaintiff; the will does not say that when the legacy shall cease to be used for hose company purposes it then shall be a legacy that has lapsed, failed or not taken effect in whole or in part. We are concerned with the ordinary understanding of the use of the words, lapse, fail or not take effect. Ordinarily it is understood that a lapsed legacy is one which has never vested or taken effect. It has been defined as one which, originally valid, afterwards fails because the capacity or willingness of the donee to take has ceased to exist before he obtained a vested interest in the gift. *Booth* v. *Baptist Church,* 126 N. Y. 242. The American and English Encyclopedia of Law (Vol. 18, pp. 747–750), defines a lapsed legacy as " one which, though good and capable of taking effect at the time when the will was made, and never revoked by the testator, fails to take effect by reason of something which has occurred between the time of the making of the will and the time when the gift under the will would otherwise vest, as that the donee has ceased to exist, or to occupy the situation upon which the testator's bounty was predicated; or because of the nonperformance of some condition or the nonhappening of a contingency. * * * A legacy or devise to a corporation or association will lapse where the beneficiary has ceased

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to exist before the death of the testator. As a general rule there can be no lapse after the legacy or devise has once vested."

By the very terms of the alleged bequest to the plaintiff in the 34th clause of the will it would seem that the testatrix intended the bequest, and the conditions as to lapsing, failing and not taking effect, to speak as of the time of her death, and not as of the time when the hose company might be dissolved as a corporation. The words of the bequest are "I give and bequeath the amounts which shall lapse or not take effect to Reverend Addison M. Sherman and Edward W. Atwater of Batavia, New York, or to the survivor of them in case one of them should die before me." The fact that she intended the survivor at her death of the two named beneficiaries to take seems conclusive that she intended that survivor to take at her death any of the named legacies that had at that time lapsed, failed or that had not taken effect. If she intended that a legacy that should lapse, fail or not take effect after her death was to be bequeathed to one of the two named beneficiaries who should be such survivor at the time of a subsequent failure or not taking effect she certainly has not expressed any such intention. The last two sentences of this 34th clause are pregnant with the idea that the testatrix intended the hose company to have the benefit of this fund even though the legacy should lapse, fail or not take effect, and that she trusted the plaintiff with the moral obligation of carrying out that intention. After bequeathing any lapsed legacy to plaintiff, the clause continues: "In the use of the same I am satisfied that they would follow what they believe to be my wishes as derived from this will. I impose upon them, however, no conditions, leaving

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the same to them absolutely and without condition or restriction." Possession of this fund with this admonition would render a just conscience very uneasy until the fund had been turned over to the hose company. Such request or expression of satisfaction is of great aid in solving the problem as to when the legacies were deemed to lapse, fail or not take effect. It is convincing that she spoke of a legacy that lapsed, failed or did not take effect at her death. It is unreasonable to suggest that she expressed satisfaction over the idea of the plaintiff's getting the legacy in question ten years after it vested, and then using it for what plaintiff believed to be the wish of the testatrix as derived from the will, that is, use it for the benefit of the hose company. Such admonition is pointless when considered in connection with plaintiff's obtaining possession of the fund after the dissolution of the hose company. It is clear, rational, intelligent, and expresses the desire of the testatrix that the hose company should have the benefit of the legacy notwithstanding some impediment might prevent the legacy's taking effect or vesting.

To give the effect to this clause claimed by plaintiff, the words "or for any cause not take effect in whole or in part" must be held applicable to the proposition that ten years after the legacy vested and wholly took effect a dissolution of the hose company was intended to constitute a partial failure of the legacy to take effect, and hence that the legacy was intended to be bequeathed to the one of the named beneficiaries who might be the survivor of the other beneficiary at her death. Such contention can not be successfully upheld from a fair reading of the will, to which resort must be had to ascertain the intention of the testatrix. There may be many conjectures and

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doubts concerning her intention as to what would become of this legacy upon the dissolution of the hose company, but it seems certain that she did not intend that such dissolution, ten years after her death, would transfer the legacy to the plaintiff; if she did have any such intention she did not express it in the 34th clause of her will.

It is urged that by the very terms of the 30th clause of the will the bequest to the hose company constitutes a legacy upon a condition subsequent; that the failure to conform to the condition subsequent created a forfeiture of the legacy, and that by the 34th clause the forfeited legacy is given over to the plaintiff. It is said that the words "I give and bequeath $10,000 to be kept at all times intact, and the income * * * thereof to be devoted to the * * * uses of said company * * *. If * * * for any cause (this legacy shall) not take effect in whole or in part I give" the same to the plaintiff, is equivalent to saying: I give $10,000 upon condition that it be kept invested and the income devoted to the uses of the company, and in the event that the company be dissolved I give said sum to the plaintiff. Upon such reconstructed will the plaintiff's cause of action depends. Does the will express any such intention? Can the court thus read these two clauses? If it were clear that such was the intention of the testatrix it would be very helpful in construing these clauses. It may be that the gift of $10,000 to be kept at all times intact and the income to be devoted to the corporate uses of the company does constitute a gift upon a condition subsequent. The difficulty with the plaintiff's contention is that the gift over to the plaintiff has not been provided for in the 34th clause of the will. The will does not say that in the event that

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the company shall be dissolved the legacy is bequeathed to the plaintiff; it is only in the event that the legacy shall lapse, fail or not take effect in whole or in part that the plaintiff takes. As has already been seen, such gift over applies only to legacies affected at the time of testatrix's death.

Upon the assumption that the dissolution and consequent inability to use the income for the uses of a hose company constitute a breach of a condition subsequent, it is not seen how the legacy can be lost to the hose company, nor how the plaintiff can acquire it under the will.

A condition subsequent annexed to a legacy of personal property will not operate, upon breach, to divest the title of a legatee unless there is an express gift over on breach of the condition. *Hogan* v. *Curtin,* 88 N. Y. 171; *Matter of Arrowsmith,* 162 App. Div. 628; *Robinson* v. *Martin,* 200 N. Y. 159. It was held in *Hogan* v. *Curtin, supra,* that a general gift of the residue of the estate was not a gift over.

If there was a breach of such condition subsequent by the dissolution and consequent inability of the hose company to continue the use of the income from the legacy for the corporate purposes of the association, such breach was caused solely by the statute creating the city of Batavia and abolishing the purposes for which the hose company was organized. It is elementary that if a condition subsequent be possible of performance at the time it is imposed, and it afterward, either by act of God or by law, becomes impossible of performance, the estate of the grantee, being once vested, is not thereby divested. 4 Kent, 134.

If the 30th clause of the will is treated as a bequest of the income from $10,000, rather than a bequest of $10,000, the title of the hose company to the corpus

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of the fund is not affected. It has often been held that where a gift of the income of a named fund is made, with no conflicting disposition of the principal fund, the beneficiary of the income takes title to the fund itself. *Hatch* v. *Bassett*, 52 N. Y. 359; *Durfee* v. *Pomeroy*, 154 id. 595; *Locke* v. *Farmers' L. & T. Co.*, 140 id. 146; *Matter of Ingersoll*, 95 App. Div. 212; *Paterson* v. *Ellis*, 11 Wend. 260.

It is contended, however, that from the reading of the 30th clause of the will it is apparent that the testatrix never intended that this legacy should be divided among the members of the hose company; and that, the law being that the intention of the testatrix must govern, it is the duty of the court where it appears that she did not intend such a disposition of the fund to prevent a disposition contrary to such intention. The statement that the testatrix never intended that the legacy should be distributed among the members as an asset of the hose company at once suggests the inquiry, What was the intention of the testatrix as to the disposition of the fund upon a dissolution of the hose company ten years after the vesting of the legacy? From the fact that she made no express provision for the disposition of the fund in the event of the dissolution of the hose company, the answer must be that her intention under such circumstances is unknown. If her intention in such event is unknown, how can it be said that she did not intend it to be treated as any other asset of the dissolved corporation? The inference seems warranted that the testatrix had no intention or wish on the subject, at least none of sufficient importance to call for an expression revealing the same. It is very evident that the testatrix intended that the fund should be kept intact and the income therefrom devoted to the uses

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of the hose company as long as there should be a hose company, and this is about all that can be said as to her intention as revealed by the will. When the time has arrived, after the lapse of ten years, that the hose company goes out of existence by the operation of a destructive statute, an event apparently unforeseen and unthought of by the testatrix, the fund is in the hands of the hose company's managers, claimed by them to be an asset of the company, with apparently no valid claim made thereto by any party to this action, certainly not by the plaintiff, who must base his claim upon a bequest that lapsed, failed or did not take effect at the death of the testatrix. There is as much justification for saying that the testatrix intended that upon the dissolution of the hose company the fund should be disposed of in accordance with the law governing the disposition of a membership corporation's assets as there is for saying that the testatrix did not intend the fund to be distributed among the members of the hose company upon its dissolution ten years after the legacy had vested and taken effect. It does no violence to the intelligence of the testatrix or to the bountiful scheme portrayed by the will to conclude that she intended the legacy to be used as stated during the lifetime of the hose company and that beyond such time she had no intention, but was satisfied with whatever disposition the law might provide.

The legacy having vested, not having lapsed, not having failed, having wholly taken effect, the further devoting of the income to the uses of the company having been rendered impossible by operation of law, there being no provision of the will divesting the hose company of the title to the legacy, there being no bequest to the plaintiff of the legacy, the conclusion is

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reached that the hose company has perfect title to the same, as against the plaintiff, and that the plaintiff's complaint and the counterclaim of the defendants Atwater must be dismissed, with costs to the defendant hose company.

Judgment accordingly.

MARIA A. CROSS, Plaintiff, *v.* EDWARD F. HOY, as Executor of the Last Will and Testament of Bell K. Wait, Deceased, et al., Defendants.

(Supreme Court, Allegany Equity Term, August, 1917.)

Contracts — to compensate for personal services — consideration — evidence.

Specific performance — contracts — consideration — wills — pleading — evidence — dismissal of complaint.

A contract to compensate another for personal services rendered to the promisor, since deceased, should not only be certain and definite and founded upon an adequate consideration but should be in writing, or if based on oral testimony it should be given or corroborated in all substantial particulars by disinterested witnesses.

By the will of her brother-in-law plaintiff was given a certain sum "for her services as housekeeper for me after the death of my wife, and in addition to what she has and may receive from me during my lifetime"; her daughter was given a certain sum "for assisting her mother about my housekeeping as aforesaid" and the remainder of the estate was given to testator's daughter. In an action to compel the specific performance of an alleged contract on the part of said daughter to make a will in plaintiff's favor, the complaint alleged that plaintiff's brother-in-law, becoming dissatisfied with his will because he had not made adequate provision for plaintiff to compensate her for her services, desired to so change his will that his daughter should have the use of the residuary estate for life with remainder to plaintiff and that testator's daughter in order to induce him to refrain from

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changing his will and in order to induce plaintiff to continue her services to him agreed and promised to hold the residuary estate in trust for plaintiff and would by proper will give, devise and bequeath all of said residuary estate which should be received by her to plaintiff. The only witness as to the consideration for the alleged agreement was the daughter of plaintiff who testified that testator told his daughter that he wanted to change his will so as to give all his property to plaintiff after said daughter was through with it. *Held*, that plaintiff's daughter and her only heir was interested in the enforcement of the alleged contract and that as the consideration therefor was not shown by evidence other than that of said daughter, and her testimony not being corroborated, plaintiff had failed to prove the cause of action and the complaint must be dismissed.

ACTION for specific performance of a contract to make a will in plaintiff's favor.

Walter N. Renwick and Fred A. Robbins, for plaintiff.

Ansley & Ansley, for defendant executor.

J. C. Leggett, for defendants Cass and Rafter.

A. P. Rose, for defendant trustees.

BROWN, J. About November 1, 1901, the plaintiff and her daughter went to live with David Kirkpatrick, the plaintiff's brother-in-law, the plaintiff acting as housekeeper and the daughter assisting. On March 25, 1902, David Kirkpatrick, then in good health, made his last will and testament, bequeathing the plaintiff $1,500, "being for her services as housekeeper for me after the death of my wife, and in addition to what she has and may receive from me during my lifetime." He also gave to the plaintiff's daughter $500 "for assisting her mother about my housekeeping as aforesaid." He gave all the re-

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mainder of his property both real and personal to his daughter, Bell K. Wait. About May 1, 1902, a bunch appeared on Mr. Kirkpatrick's face which shortly thereafter was found to be a cancer; its condition rapidly became serious and it was a grave menace to health and life, resulting in Mr. Kirkpatrick's death on April 6, 1903, During his illness the plaintiff and her daughter continued to reside with him, taking care of the household and performing services as nurse in dressing the cancer and looking after him generally. During the latter part of his illness a practical nurse was also employed. Upon his death Bell K. Wait took title to the Kirkpatrick residence under the provisions of his will, and personal property of the value of $20,355 was delivered to her as residuary legatee in said will. Bell K. Wait died November 4, 1915, leaving a last will and testament, executed in July, 1911, which was admitted to probate March 16, 1916, in and by which will she bequeathed to the plaintiff a mink cape, all her white china, eight cut glass finger bowls and $2,000, and to the plaintiff's daughter the sum of $1,000. The Kirkpatrick residence she devised to the defendant trustees in trust to make use of as a home for childless women; one-fourth of the remainder of her estate she gave to the defendant Cass, one-fourth thereof to the defendant Rafter, and one-half thereof to the defendant trustees for the benefit of the home for childless women.

On July 19, 1916, the plaintiff brought this action, alleging that on about October, 1902, the decedent, David Kirkpatrick, was dissatisfied with the terms of the will that he had executed in March, 1902, for the reason that he had not made adequate provision for the plaintiff to compensate her for her services, and desired to change the provisions thereof so that his

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daughter, Bell K. Wait, should have the use of the residuary estate for life, with remainder to the plaintiff; that Bell K. Wait, in order to induce David Kirkpatrick to refrain from changing his will and in order to induce the plaintiff to continue her services, agreed and promised to and with said Kirkpatrick and the plaintiff that if the said Kirkpatrick would not change his will and if plaintiff would continue her services to him, she, Bell K. Wait, would hold said residuary estate, to be received from David Kirkpatrick, in trust for the plaintiff and that she, Bell K. Wait, would by proper will give, devise and bequeath all of said residuary estate which should be received by her in the will of said Kirkpatrick to the plaintiff. Plaintiff demands judgment that she be decreed the owner of such real estate and that she recover from defendant executor the sum of $20,355, the amount in his hands received by his testatrix, Bell K. Wait, from the estate of David Kirkpatrick.

In proof of the plaintiff's claims, the plaintiff's daughter testified that about the last of October, 1902, she was present at the Kirkpatrick residence in Cuba, N. Y., and heard a conversation between David Kirkpatrick, Bell K. Wait and the plaintiff wherein David Kirkpatrick said to Bell K. Wait, "Well, Bell, I have sent for you, because I don't feel I have given Tute [plaintiff] enough in my will; I didn't realize what I was getting her into last November when I asked her to come and keep house for me; I don't want a stranger to come into the home, and she has been so good to me, I want her to see me through; I want to change it so that what is mine will go to her when you are through with it." To which Bell K. Wait replied, "Father, you are sick and I wouldn't bother getting a lawyer here to change things; if Tute [plaintiff] will stay I will go home and make a will leaving all that

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comes to me from you to her, and things will be just as you want them to be." David Kirkpatrick said: "All right, if you will do that. I don't want my money to go up in the Wait Settlement, Henry [Bell K. Wait's husband] has enough to leave to his own people, and I want Tute [plaintiff] to have this property when you are through with it so it will remain in the family." Bell K. Wait replied: "I will go right home now and fix everything up just the way you want it." David Kirkpatrick turned to the plaintiff and said: "Are you satisfied with it?" to which plaintiff said she was with that arrangement. On the way to the railroad station Bell K. Wait said to plaintiff's daughter: "Father need never worry, his money will never go up in Wait's Settlement. I will go home and fix things as he wants them, and I will let you know in a day or two when I get it all fixed."

November 4, 1902, Bell K. Wait wrote a letter to plaintiff's daughter saying, among other things, "Tell my dear father to keep up courage * * *. Tell him and be sure, I have attended to that business he suggested so he need have no further fear how things will go when we are all dead. Everything will be arranged to his entire satisfaction * * *. I don't see why I should try to prolong my useless existence, I can't go till my time comes and that is sure, neither can I stay or defend myself from death when it comes if I would. I have arranged all my little matters and now 'let her go.' Good bye my best love to daddy & lots for yourself and mother, believe me as ever thine Bell. Burn this sure."

Plaintiff's daughter also testifies that about ten days after the foregoing letter was received Bell K. Wait came to Cuba and in the presence of the witness told her father, David Kirkpatrick, that she had made her will. David Kirkpatrick seemed pleased about it

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and said: "Bell does just as I want her to; she is a good girl. God bless her."

"Q. At any time in this conversation, in either of these conversations, was anything said by anybody on the subject of having this agreement put in writing? A. When my uncle told it to my mother, when Bell had done this— [Objection.] Q. Well, during Mrs. Wait's presence? A. After Mrs. Wait had made her will, he asked mother right before me, 'Does that satisfy you?' Mother said it better be in black and white, but he said, 'She will do just as I want her to.'"

Margaret Way testified that on one occasion at the Kirkpatrick residence after the death of David Kirkpatrick a Mrs. Bartholomew in the presence of the witness said to Bell K. Wait, "How nice it is that your father gave this to Mrs. Cross after you are through," and that Mrs. Wait replied, "I'm living yet."

George H. Swift testified that on one occasion when Bell K. Wait was talking with him about selling the Kirkpatrick residence the witness said: "I thought that went to Mrs. Cross when you are through with it." Mrs. Wait replied, "Who told you so?" The witness said, "Your father," and she said, "Well, she will have to wait a good while until she gets it because I'm going to live until I'm eighty-five."

Dallas B. Whipple testified that in 1905 he met Bell K. Wait on the street and said to her, "Your father told me that Mrs. Cross and Cornelia (the plaintiff's daughter) were taken care of and Mrs. Cross would be well paid for what she had done for him. Your father told me that you had made a will giving the home and his property, the balance of his property, to Mrs. Cross; and he said, 'I asked if she would be willing to do that and she said she would, and she went home and in two or three days wrote a letter

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saying she had done it.'" The witness Whipple testified that Bell K. Wait "said she wrote a letter saying she had done it, made the will, and it would go just exactly as he wanted it should go;" and he further testified that he said to Bell K. Wait, "Your father told me you wrote a letter that you made a will and everything would go just as he wanted it," and that she replied, "That letter was burned long ago;" and according to the witness "She spoke up with some force as if she didn't like our conversation."

Does such testimony establish in a clear and convincing manner that in consideration of David Kirkpatrick's refraining from changing his will Bell K. Wat agreed that on her death she would give to plaintiff all the property that she should receive under the unchanged will of David Kirkpatrick?

The Court of Appeals has said that such contract should be in writing and that the writing should be produced, or, if ever based upon parol evidence, it should be given or corroborated in all substantial particulars by disinterested witnesses. *Hamlin* v. *Stevens,* 177 N. Y. 39. "We have repeatedly held that such a contract must not only be certain and definite and founded upon an adequate consideration, but also that it must be established by the clearest and most convincing evidence." *Rosseau* v. *Rouss,* 180 N. Y. 116.

This is an action to enforce a contract. The consideration for the alleged agreement of Bell K. Wait to will all property she received from her father to the plaintiff was the withholding of the intention of David Kirkpatrick to change his will. While it is true that the letter above set forth speaks of Bell K. Wait having made her will as suggested by her father, and the witnesses relate conversations with her upon the subject of her having made a will leaving all the prop-

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erty she received from her father to the plaintiff, and while it is true that the letter and the witnesses corroborate about all the items of the alleged agreement except the essential consideration, yet only one witness pretends to provide the necessary consideration for such alleged agreement. The daughter of the plaintiff, Cornelia Cross, testifies that David Kirkpatrick told his daughter, Mrs. Wait, that he wanted to change his will so as to give all his property to the plaintiff after Mrs. Wait was through with it. This daughter must be held to be interested in the enforcement of this alleged contract; she is the only heir at law of her mother; her mother is now upwards of seventy-one years of age. Corroboration of the evidence as to the consideration for the contract is quite as important as corroboration of the evidence as to any other part of the contract. The promise by Bell K. Wait to will to plaintiff what property she would receive from her father would not be enforcible unless it was founded upon some consideration. The plaintiff alleges that the consideration for such promise was the refraining by David Kirkpatrick from changing his will; that Bell K. Wait induced her father not to change his will; that Bell K. Wait prevented David Kirkpatrick from giving a larger legacy to the plaintiff than the legacy of $1,500 in the will of March, 1902, by making the promise or agreement. When the Court of Appeals has said that the contract must be founded on an adequate consideration (*Rosseau* v. *Rouss, supra*) and, if based on parol evidence, corroborated in all substantial particulars (*Hamlin* v. *Stevens, supra*), there is no escape from the conclusion that a vital part of this alleged contract, the consideration, must be proved by evidence other than that given by Cornelia Cross, or that her testimony must be corroborated. There is not a suggestion in the letter of

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Bell K. Wait, or in the testimony of the witnesses Swift, Way or Whipple that David Kirkpatrick ever thought of changing his will of March, 1902, or in any way made the legacy and devise to his daughter, Bell K. Wait, conditional upon her leaving the same to the plaintiff upon her death. In the will made March, 1902, David Kirkpatrick devised and bequeathed all his property to his daughter, Mrs. Wait, absolutely, excepting legacies to plaintiff and others. Any promise made by the daughter in October, 1902, to use, enjoy, devise or bequeath this property in any particular manner, even made to David Kirkpatrick, would create no legal obligation upon her unless founded upon some consideration. The consideration here alleged and sought to be proved is the withholding of the intention to change the will, because of the promise. The failure to prove the consideration of the alleged contract in the manner specified by the Court of Appeals forces the conclusion that the plaintiff has not proved her cause of action, and her complaint must be dismissed, with costs to all parties payable out of the estate.

Ordered accordingly.

Matter of the Estate of FERDINAND BLUMENTHAL, Deceased.

(Surrogate's Court, New York County, August, 1917.)

Domicile — intention to abandon — wills — evidence — transfer tax.

The evidence in a transfer tax proceeding upon the issue as to the last domicile of a decedent who in his last will and in a codicil thereto described himself as "of the city of New York temporarily sojourning in Paris" where he had a home, but who died at sea on his way to New York, considered, and *held*,

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not to show intention to abandon New York and acquire France as his domicile, and that he was at the time of his death a resident of the state of New York.

TRANSFER TAX proceeding.

Carter, Ledyard & Milburn, for estate of Ferdinand Blumenthal, deceased.

Lafayette B. Gleason, for state comptroller.

COHALAN, S. This is a transfer tax proceeding, in which the question at issue is the domicile of the decedent. Ferdinand Blumenthal was born in Germany in the year 1847. He emigrated to the United States when about twenty-three years of age, settled in New York city, engaged in his own name in the leather business, acquired a house at No. 57 East Fifty-sixth street and married the daughter of a New York family. She, with the two children of the marriage, now survives him. In 1879 he was naturalized as an American citizen in the Superior Court of New York city. With the passing years he attained eminent success in the business world, developed greatly the manufacturing end of his concern, formed a partnership, and in 1889 admitted to that partnership his brother-in-law, J. Stevens Ulman, the firm being styled F. Blumenthal Company. He retained, however, the controlling interest therein. In April, 1895, he made this will, a lengthy document involving trusts under the New York law, and described himself therein as "of the City of New York temporarily sojourning in Paris, France." In 1909 he purchased a plot of land in Paris, and began at once the erection of a palatial residence. In 1910, while the same was nearing completion, he executed, in Paris, a codicil to his will and described himself as "of the City of New York temporarily sojourning in

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the City of Paris." Later in the same year he made a French will disposing of this Paris house and its effects, and described himself therein as " a merchant and American citizen of the State of New York." It was also in this year that the decedent's business was incorporated under the laws of the state of Delaware, with the decedent as president, an office he held continuously until his death. There is some conflict of evidence as to precisely when he moved into this house located at No. 34 Avenue de Bois de Boulougne, Paris, and in view of the position taken by the executors it becomes important to fix the date. The decedent's son first testified that it was in 1911, but later changed this to either the end of 1911 or towards the first of 1912. The decedent's secretary stated first, quite emphatically, that it was in the spring of 1912, but later admitted that this was only his best recollection. On the other hand, the decedent's brother-in-law was able to remember numerous luncheons and repeat several conversations which he had with the decedent in June and July, 1911, " at his residence in Paris, 34 Avenue de Bois de Boulougne." I am convinced, therefore, that the decedent first occupied this house not later than June, 1911. In November, 1911, at Paris, he executed a revocation of the power of attorney given to his brother-in-law in 1895, and described himself " as of the City, County and State of New York." Almost from the time his secretary entered his employ in 1905 the decedent's health began to fail, and he suffered from eye strain, intestinal trouble and hernia. This made travel more difficult for him, so that in his last years he canceled his different trips, save the one to Lucerne in July and August of each year. In August, 1914, he was at Lucerne with his secretary. He was registered with the American consulate agent there as " Ferdinand

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Blumenthal, New York, stopping at the Hotel National, Lucerne." War having been declared, travel to France became uncertain, and between that and the desire to be at the helm of his business in this time of stress he determined to go to New York. Wrapping the American flag around his house in Paris, because, as he writes, "The *Herald* stated that Americans should register their residences in Paris under the protection of the American Embassy," so that, as he frankly confesses in a later letter, "in case of damage I might have some claim for compensation," he boarded the steamship *Patria,* bound from Naples to New York. He died at sea off the coast of Spain, October 20, 1914. The body was landed at the port of Almeria, Spain, the American consul there reporting the death of an "American citizen." It was forwarded to Paris, the funeral being from the American Protestant chapel there. He never took any of those steps which are prescribed by the Code Napoleon for the purpose of acquiring a domicile in France, and he was registered with the commissariat of police at Paris as an American citizen. Despite the record, the executrix and executor, his widow and eldest son respectively, describing themselves in their oaths of office filed in this court "as temporarily sojourning in the City of Paris, France, and have no actual address at the present time in the United States," resist the attempt to impose any transfer tax upon the decedent's estate upon the ground that at the time of his death he was domiciled in Paris, France. They cluster their arguments around the contention that the decedent definitely abandoned his New York domicile about the time he moved into his new house, *i. e.,* as they put it, "in the spring of 1912." There is no doubt that this palatial residence, with its conveniences, added greatly to the comfort of the dece-

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dent. But taking into consideration his wealth, his requirements along certain lines because of his physical disorders and his wife's social ambitions, the purchase of a private residence in a city where he was accustomed to spend so much of his time is not as significant as the executors would have it appear. Moreover, I have fixed this house moving as not later than June, 1911, and there is the sworn statement of the decedent made in November, 1911, to the effect that he is " of the City, County and State of New York." Here let me consider the contention that in his latter years the decedent gradually lost his interest in his business and allowed his brother-in-law and son to manage the same. I think the record is filled with testimony to the contrary. He controlled the partnership, he became and remained president of the corporation, he hastened to the business when it was beset by the panics of 1903 and 1907, and he died on his way to be near the seat of action in the strenuous days subsequent to the declaration of the present war. Read his letters which are in the record, and you arise convinced that up to the day of his death here was the man at the helm of the F. Blumenthal Company. Stress is laid upon the decedent's part in the life of Paris, his art collection and his interests in artists and his friends, who, it is testified, were chiefly exclusively French. I think it is pretty evident that he took little interest in the life of Paris. His secretary testifies that he rarely went out, and his letters confirm this. Undoubtedly his art collection was of interest to him, yet it was by no means a centre around which his life gravitated. As for his friends, a reading of the list as given by his brother-in-law seems to indicate that they were very cosmopolitan. The executors marshal before me a number of statements made to the son Cecil, the brother-

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in-law J. Stevens Ulman, the valet Allesina, the secretary Bowen and the attorney Baylis. Some of these were made subsequently to 1911, others prior thereto, I have considered them carefully, and have carefully weighed their source, their phraseology and the circumstances surrounding their utterance, and I am convinced that they fail to equal, far less to outweigh, the acts and solemn declarations which I have already summarized. The leading case of *Matter of Newcomb*, 192 N. Y. 238, 250, lays down the following guiding rule: "Less evidence is required to establish a change of domicile from one state to another than from one nation to another. In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence is of no avail." Residence there undoubtedly was. Was there intention? When I consider that this man, who was a native of Germany, took, after a seven-year residence in the United States, the necessary steps to become a citizen, thus manifesting in no uncertain terms his election to make this his home, but failed, although living in Paris for fourteen years, to take any of those steps prescribed by the Code Napoleon for the acquisition of residential privileges; when I consider that he made his fortune in the United States, kept it here and retained to the very day of his death a vital grasp on the financial affairs of his business, coming to watch over it in times of peril; when I consider that in every formal declaration of his life, so far as it appears where it became necessary for him to state his domicile, he invariably claimed it as the state of New York and not France; when I consider that at the outbreak of the present war he hastened to avail himself of the protection of our flag, and that on every occasion when it inured to his benefit he claimed American citizenship and residence in

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New York city, I am convinced that, although he liked his Paris home because of its conveniences and the opportunity it afforded for the social activities of his wife, he had " no absolute and fixed intention to abandon one and acquire another " (*Matter of Newcomb, supra,* 251), to abandon New York and acquire France as his domicile, and I hold that he was at the time of his death domiciled in the state of New York, and accordingly remit the report to the appraiser.

Decreed accordingly.

WILLIAM P. FOGARTY, Plaintiff, *v.* MARY A. STANGE and Others, Defendants.

(Supreme Court, New York Special Term, August, 1917.)

Partition — motion for final judgment in — allowances — infants — receivers — actions — liens — evidence — referees.

Where, on motion for final judgment in an action for the partition of real estate, it is conceded that some of the amounts to be deducted from the gross proceeds of sale in order to arrive at the net proceeds divisible among the owners of shares cannot yet be determined, nevertheless allowances to parties in interest can be made.

The value of the interest of each share owner in the property is the value of his undivided interest considered as a fraction of the whole property and not the particular sum of money he would receive after the deduction of liens of other share owners against his share.

Where infant defendants in an action for partition have no personal interest in the properties involved, no allowance may be granted to their guardian, but they are entitled to their taxable costs.

Where a receiver of the rents of property sought to be partitioned appointed in another action having different parties was not made a party to the action for partition, evidence as to the amount of his lien on the property is inadmissible, unless

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the decree contains a provision that the amount to be paid to him be fixed.

In an action for partition the referee appointed to sell has power and it is his duty to adjourn the closing of title to certain of the parcels purchased by one of the parties to the action who expects to apply on the purchase price her share of the proceeds of sale.

The order of reference made in an action for partition may direct the referee to ascertain and report as to any matters not specifically enumerated but incidental to the matters before mentioned in the order or relating to or growing out of the interlocutory judgment or appropriate to be provided for in the final judgment.

The interests of specific lienors in the action are sufficiently guarded by the following language of the final judgment: "After first paying from the proceeds of such other parcels the specific or general liens thereon."

MOTION by the plaintiff for final judgment in an action for the partition of real property and for the fixing of costs and allowances to be awarded by such final judgment.

Frayer & Alden (Eugene Frayer, of counsel), for plaintiff.

William F. Clare, for defendant Mary A. Stange and others.

Blandy, Mooney & Shipman (Edmund L. Mooney and Leon M. Woodworth, of counsel), for defendant Nannie H. Fogarty.

Alexander & Keenan, for defendants Nannie H. Fogarty and John F. Keenan, as executors of the will of Helen Keenan, deceased, and others.

Joseph A. Keenan, for defendant Mary J. Brinley.

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Johnston & Johnston (Lewis Johnston, of counsel), for defendants Annie Davis and Patrick A. Fogarty.

Edward P. Orell, Jr., for defendants Ellen T. O'Reilly and others, and guardian *ad litem* of the infant defendant J. Van Holland Davis.

Clarke & Clarke (Richard H. Clarke, of counsel), for defendants Hugh P. Skelly and others.

McKenna & McKenna, for defendant Sarah McKenna.

Joseph H. Fargis, guardian *ad litem* for infant defendant Hugh Stange.

Stephen J. McTague, for Lillian F. Keenan, guardian *ad litem* for the infant defendant Julie M. Keenan.

Dean, Tracy & McBarron, for Lawyers' Title and Trust Company and Albert F. D'Oench, executors of the will of May M. Johnson, deceased.

George L. Ehrhardt, for defendant William P. Fogarty, as administrator, etc.

Hugh E. O'Reilly, guardian *ad litem* of infant defendants O'Reilly.

Charles O. Maas, for James P. Campbell, as executor, etc.

M. Edward Kelley, for John E. Connolly, receiver.

Adolph E. Gutgsell, receiver of property of William P. Fogarty.

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John J. Lenehan, for Loretta E. Cosgrove and Joseph M. O'Brien and Loretta E. Cosgrove, as trustees, lienors.

Paskus, Gordon & Hyman, for Kips Bay Brewing and Malting Company.

GIEGERICH, J. Although this motion is in form for final judgment, upon the argument it was agreed that no attempt at this time should be made to settle the terms of the final judgment, but that the court should fix the allowances to be granted and should determine sundry questions raised in other motions made concurrently with this motion, and that all other questions raised by such motions should stand over until the entry of the final judgment, which will have to await the accounting of the receiver of the rents of the properties embraced in this proceeding, which accounting will have to be held in another action in which the receiver was so appointed, and will also have to await the report of the referee to be appointed in the order to be entered hereon upon various questions to be stated in that order. *First,* with respect to the allowances, only one serious question is raised, and that relates to the right of the defendant Patrick A. Fogarty to participate in the $2,000 which is conceded should be apportioned among the defendants. Patrick A. Fogarty is the owner of an undivided one-eighth of the properties embraced in the action, but there are liens against his undivided interest aggregating such an amount that his share of the net proceeds of sale, based upon the prices realized, will fall short of the aggregate of the liens, so that there will, in fact, be no amount whatever payable to him from the hands of the referee. The plaintiff owns an undivided one-eighth share and the defendants, among

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them, have the other seven-eighths. The practical effect of refusing any allowance to the defendant Patrick A. Fogarty would be to divide the $2,000 permitted by the statute into sixths instead of sevenths, after deducting a small allowance to be made to one of the defendants who has a dower interest in some of the properties. No authorities are cited on either side, and I am unable to see how it would be practicable or in fact possible to make the allowances to the defendants at this time if those allowances are to be based upon the amounts they are severally to receive from the referee. Concededly, some of the amounts which will have to be deducted from the gross proceeds of sale in order to arrive at the net proceeds of sale divisible among the owners of shares cannot yet be determined, and consequently it cannot yet be determined just what amounts will be coming to the different share owners from the referee. There are various liens upon the shares of various defendants, and some of them have liens against the shares of each other. Even if all the necessary figures were obtainable at this time, the computations required to arrive at the results logically contemplated by the objections would be elaborate and difficult. The latest expression of our highest court on the question of allowances is contained in *Warren* v. *Warren,* 203 N. Y. 250, in which the court, at page 255, said that, as to the plaintiff, the value of the subject-matter is the value of the whole property, and "as to each defendant it is the value of his interest in the property." By this expression I think is meant the value of the undivided interest of each defendant, considered as a fraction of the whole property, and not the particular sum of money which such defendant would receive after the deduction of any mortgages or judgments or liens of other share owners

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against his share on account of his having received more than his share of rents, or any liens of any character. Not only is it proper in the ordinary sense of language to speak of the interest of an owner of an undivided one-eighth share in the property as a one-eighth interest in the property, irrespective of liens, but in a very substantial and real sense he has such an interest, and it properly devolves upon him to make any contest necessary to establish and defend that fractional interest if it is challenged in whole or in part by any other party to the action. The money representing his fractional share is his money, whether it is all to be paid to him by the referee or whether part is paid to him and part to his creditors, or whether all is paid to his creditors. Plainly, it is his money, even though he immediately turns it over to his creditors after receiving it, and so, too, it is his money that is paid to his creditors, although the payment be made by the hand of the referee. In contending for his fractional share, each owner makes a contest for the benefit of the lienors upon his share, all of them being united in interest in that share, and it would seem to be proper to allow him his fractional portion of the $2,000 divisible among defendants. This case is one where the allowance of the full $4,000 permitted by statute is wholly inadequate to compensate the attorneys for the labors involved. I will allow to the plaintiff $2,000 and to the defendant dowress, Ellen T. O'Reilly, the sum of $75, and will divide the remainder, amounting to $1,925, into shares of one-seventh each, amounting to $275 each, and make allowances accordingly to the various defendants. The above allowance to Ellen T. O'Reilly is based upon the amount she is to receive on account of rents, as well as her interest in the proceeds of sale. I regret my lack of power to grant any allow-

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ances to the guardians, because the infants they represent have no personal interest in the properties embraced in the action. The order, however, should provide for the payment of their costs to be taxed. With respect to other provisions of the order, I agree with the suggestion made in the brief submitted on behalf of the defendant Nannie H. Fogarty that there should be a provision for fixing, in this action, the amount of the lien of the former receiver. As I understand it, that receiver was appointed in another action and his accounts are expected to be passed upon and the amount to be paid him fixed in that other action; but I do not understand how it is expected that any proof of the result in the other action can be put in evidence in this action, which, presumably, has different parties, unless there is a provision made in some such form as is suggested in the brief referred to which will be binding upon the parties to this action. Otherwise, against the objection of any party in this action, the referee herein would not be authorized to receive in evidence any order or judgment in an action between other parties. At best, the situation, as I understand it, is an extraordinary and anomalous one and may lead to complications, since the receiver in the other action has been given a lien in this action, but at the same time he has not been made a party to this action and nothing done in this action can be binding upon him. Manifestly, if progress is to be made and a definite conclusion reached, it will be necessary in some way to establish some connection between the two actions so far as this lien is concerned. With respect to the suggested provision in the order adjourning the closing of title to certain parcels purchased by one of the parties who expects to apply on the purchase price her share of the proceeds of sale, I do not think that

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such a provision is necessary, because, under the circumstances, it seems clear that the referee has power and it is his duty to adjourn the closing in any case where the purchaser wishes to offset against what he is to pay the referee any sum that he is to receive from the referee. I am of the opinion that the following provision, namely: "Ordered, that it be further referred to said referee to ascertain and report as to any matters not hereinbefore specifically enumerated, but incidental to the matters hereinbefore mentioned, or relating to or growing out of the interlocutory judgment, or appropriate to be provided for in the final judgment in this action," suggested in the same brief, might well be incorporated in the order to be entered now, so as to avoid the delay and necessity of another application to the court if any question not specifically anticipated and provided for in other portions of the order should arise. I have carefully considered the objections made on behalf of the lienor Cosgrove to the proposed 3d paragraph of the order submitted by the plaintiff, but am satisfied that the apprehensions giving rise to such objections are groundless. That paragraph guards the interests of specific lienors by the following language: "After first paying from the proceeds of such other parcels the specific or general liens thereon." Since the papers were submitted I have received from the attorneys for the executors of Helen Keenan, deceased, a letter and a memorandum objecting to the 7th paragraph of the order as proposed by the plaintiff's attorneys and complaining that no previous notice had been given by any one of an intention to obtain such a provision. When the new order to be drafted is presented it may be well to retain that provision tentatively and at the time the new order is presented for settlement briefs may be handed in on

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this point. I wish to call the attention of the parties to the fact that the 4th paragraph of the order as proposed by the plaintiff seems to exonerate certain parcels from bearing any share of the general expenses of the action, and provides that only the respective amounts of the underlying mortgages on those parcels shall be deducted from the gross proceeds of sale of those parcels in arriving at the net proceeds of the sale of those parcels for distribution. If that is not the intention of the section referred to, the language should be suitably altered. Let a new order be prepared in conformity with the views above expressed and presented for settlement on notice; and in order that counsel may have an opportunity to attend to such settlement at a more suitable time I suggest that such notice of settlement be given for a date not earlier than September sixth. Upon the day for which notice of settlement is given, let all papers be handed in to the county clerk.

Ordered accordingly.

EMMA J. COOK, Plaintiff, *v.* MATTHEW A. KANE and Others, Defendants.

(Supreme Court, New York Special Term, August, 1917.)

Foreclosure — of mortgages — actions — receivers — judgments.

Where the grantee of land subject to a mortgage gives a second mortgage thereon the land is the primary fund for the payment of the first mortgage, though the grantee did not covenant to pay the same, and, upon foreclosure of the first mortgage, rents in the hands of the receiver who was also the receiver appointed in an action to foreclose the second mortgage should be applied on the judgment for deficiency entered in the action to foreclose the first mortgage.

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MOTION to pass receiver's account in a foreclosure action, and for a direction as to the payment of the balance in his hands.

Louis Fabricant, for receiver.

Henry S. Cook, for plaintiff.

Charles J. Gerlich, Jr., for defendant Herman Roth.

GIEGERICH, J. Upon this application by a receiver appointed in a foreclosure action to have his account allowed and commissions and attorney's fees fixed, a question is raised between the first mortgagee and the second mortgagee as to the proper disposition to make of the balance of rents in the receiver's hands amounting to $1,040, subject to the commissions and counsel fee to be allowed. The sale, which was had under the foreclosure of the first mortgage, resulted in a deficiency judgment of $313.58 in favor of the plaintiff and against the executors of Bridget C. Kane, deceased, who was upon the bond given in connection with that mortgage. The receiver was first appointed on August 3, 1916, in an action brought to foreclose the second mortgage. Subsequently, and on the 27th day of December, 1916, he was also appointed as receiver in the present action. All the rents embraced in the present action were collected subsequently to the appointment in this action. After giving the bond and mortgage for $18,000, the said Bridget C. Kane conveyed the premises to the defendant Matthew A. Kane, subject to that mortgage. Thereafter Matthew A. Kane gave to the defendant Herman Roth the second bond and mortgage in question in the sum of $3,500. On behalf of Herman Roth,

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the holder of the second mortgage, which was cut off by the foreclosure sale under the first mortgage, the court is asked to direct that the funds in the receiver's hands be paid to him as second mortgagee, and that the plaintiff be relegated to the collection of her deficiency judgment out of the estate of Bridget C. Kane, which is said to be sufficient to pay the deficiency, which is not disputed. In the alternative, it is asked on behalf of the defendant Roth that if the court directs the payment of the deficiency judgment out of the moneys in the hands of the receiver, then shall it also direct the plaintiff to make to Roth an assignment of such deficiency judgment. No briefs are submitted nor authorities cited; but it seems to me the question is controlled by the principle of *Murray* v. *Marshall*, 94 N. Y. 611, and *Spencer* v. *Spencer*, 95 id. 353, in which it was held that where an obligor and mortgagor conveys the mortgaged premises subject to the mortgage, although with no covenant on the part of the grantee to pay, the land becomes the primary fund for the payment of the debt and, to the extent of its value, the grantee stands in the relation of a principal debtor and the grantor has an equity similar to that of a surety. From this it follows that when Matthew A. Kane took the property by deed from Bridget C. Kane, subject to the first mortgage of $18,000, Bridget C. Kane became entitled, as against Matthew A. Kane and any one claiming under him as the defendant Roth, the second mortgagee, necessarily does in this case, to have the mortgaged property held primarily liable for the payment of the $18,000 mortgage. Either of the directions which the defendant Roth seeks to have the court make would be in direct violation of this right of the estate of Bridget C. Kane and cannot be made. The request of the receiver for an allowance of $100 for his compensation and of $75

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for counsel fee is not opposed by any of the parties and seems to be reasonable, and the allowances as asked for are therefore made.

Ordered accordingly.

Matter of the Application of ROBERT C. POSKANZER, as Trustee of the Bankrupt Estate of FLORENCE I. REYNOLDS, for the Issuance of an Execution under Section 1391 of the Code of Civil Procedure of the State of New York against the Income from Certain Trust Funds of Said FLORENCE I. REYNOLDS in the Hands of Charles C. Bullock, Jr., Trustee under the Last Will and Testament of MATHEW H. BENDER, Deceased, and Funds to Come into His Hands under Said Will.

(Supreme Court, Albany Special Term, August, 1917.)

Bankruptcy — trustee in — executions — motions and orders — trusts — Real Property Law — Bankruptcy Act, § 47, clause 2 (a) as amended — Code Civ. Pro. § 1391.

The words "other personal property, which can not be reached by execution" in section 98 of the Real Property Law, which provides that "Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property, which can not be reached by execution," define the surplus income of spendthrift trusts, by implication at least, as a kind of personal property that can not be reached by execution.

A trustee in bankruptcy being vested under clause 2 of subdivision a of section 47 of the Bankruptcy Act, as amended in 1910, with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied, a motion made by a trustee in bankruptcy, within the time allowed by law for the filing of claims against the bankrupt's estate,

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for an order directing that an execution issue under section 1391 of the Code of Civil Procedure against the income from certain trust funds for the benefit of the bankrupt and directing the testamentary trustee to pay over, etc., will be granted.

MOTION by Robert C. Poskanzer, as trustee of the bankrupt estate of Florence I. Reynolds, for an issuance of execution under section 1391 of the Code of Civil Procedure.

Prior & Aufsesser, for trustee in bankruptcy.

Mills & Mills, for Florence I. Reynolds.

NICHOLS, J. One Mathew H. Bender died December 28, 1912, leaving a last will and testament, which was thereafter duly probated in the Surrogate's Court of Albany county, which last will and testament contained among other devises and bequests the following:

"*Fourth.* All the rest residue and remainder of my property and estate, both real and personal, of whatsoever nature, and wheresoever situated, which at the time of my death, shall belong to me, or be subject to my disposal by Will, I give, devise and bequeath to Charles C. Bullock, Jr., of Saratoga Springs, New York, in trust, nevertheless, to be disposed of as hereinafter directed, and I direct my Trustee herein named, to divide the said residue or remainder of my property both real and personal, hereby bequeathed and devised into two equal parts, each part being of equal market value and the income from each part, being as nearly equal as practicable.

"*Fifth.* I further direct the said Charles C. Bullock, Jr., my Trustee herein named, to invest the one equal half or part of the residue or remainder of my property and to keep the same invested and to receive the rents, issues and profits therefrom and after

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defraying all taxes and other lawful charges upon the same, to semi-annually pay the net income thereof in equal shares to Florence Irving Reynolds and Frederick R. Bender during their natural lives.

" I further direct that in the event of Frederick R. Bender dying prior to the death of Florence Irving Reynolds, that the income hereby directed to be paid to the said Frederick R. Bender shall be paid to the said Florence Irving Reynolds during her natural life."

The said trustee, Charles C. Bullock, Jr., named in said last will and testament, has been paying the net income of said estate payable to Florence I. Reynolds, which amounts to more than $4,000 per year, to the said Florence I. Reynolds, on the first day of January and July of each year. The said Florence I. Reynolds on the 2d day of April, 1917, filed a petition in the United States District Court in voluntary bankruptcy and on the 11th day of July, 1917, the said petitioner, Florence I. Reynolds, was duly granted a discharge in bankruptcy. In the petition for adjudication in bankruptcy the petitioner disclosed no assets, except those claimed to be exempt by law, and disclosed liabilities to the extent of $8,031.09. April 22, 1917, Robert C. Poskanzer was duly elected and appointed trustee of the bankrupt's estate and has duly qualified, and is now acting as such trustee.

The time allowed by law for the filing of claims against the bankrupt's estate has not yet expired. The trustee in bankruptcy applies for an order directing that an execution issue under section 1391 of the Code of Civil Procedure against the income from the trust funds of the said Florence I. Reynolds and directing Charles C. Bullock, Jr., as trustee under the last will and testament of Mathew H. Bender, deceased, the person from whom such income from

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trust funds are due and owing and will hereafter become due and owing to the said Florence I. Reynolds, to pay over to the officers presenting such execution ten per cent thereof from said income from said trust funds now due and as the same shall become due, until the said execution shall be wholly satisfied.

Clause 2 of subdivision a of section 47 of the Bankruptcy Act (30 U. S. Stat. at Large. 567), as amended by the act of June 25, 1910 (36 U. S. Stat. at Large, 840, ¶ 8), provides as follows, to wit: "Trustees of bankrupts as to all property not in the custody of the Bankruptcy Court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

Section 1391 of the Code of Civil Procedure provides: "Where a judgment has been recovered and where an execution issued upon said judgment has been returned wholly or partly unsatisfied, and where any wages, debts, earnings, salary, income from trust funds or profits are due and owing to the judgment debtor or shall thereafter become due and owing to him, to the amount of twelve dollars or more per week, the judgment creditor may apply to the court in which said judgment was recovered or the court having jurisdiction of the same without notice to the judgment debtor and upon satisfactory proof of such facts by affidavits or otherwise, the court, if a court not of record, a judge or justice thereof, must issue, or if a court of record, a judge or justice, must grant an order directing that an execution issue against the wages, debt, earnings, salary, income from trust funds or profits of said judgment debtor."

Section 98 of the Real Property Law, formerly section 78 of the Real Property Law, and section 57 of title 2 of chapter 1 of part 2 of the Revised Statutes

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provides: "Surplus income of trust property liable to creditors. Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property, which can not be reached by execution."

The statute by the words "other personal property, which can not be reached by execution" defines the surplus income of spendthrift trusts by implication at least as a kind of personal property that cannot be reached by execution.

By section 1871 of the Code of Civil Procedure it is provided that a judgment creditor's action may be brought where an execution against the property of the judgment debtor, issued out of a court of record, has been returned wholly or partly unsatisfied.

Jenks v. *Title Guarantee & Trust Co.*, 170 App. Div. 830, was a case where the appellant, Charles P. Buchanan, had filed a voluntary petition in bankruptcy and the plaintiff was appointed his trustee and a small amount of assets was disclosed. Subsequently he received his discharge in bankruptcy. The judgment creditor's action was brought by the trustee in bankruptcy to recover the surplus funds over and above the amount necessary for the support of the beneficiary. The court modified the judgment as to the amount necessary for the support of the said Charles P. Buchanan and as modified affirmed the same. The effect of the foregoing amendment of section 47 of the Bankruptcy Law was construed therein, the court saying, at page 834: "It seems to me that said amendment confers upon the trustee in bankruptcy the right of recovery. The Constitution

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of the United States (Art. 1, § 8, subd. 4) provides that the Congress shall have power 'To establish * * * uniform laws on the subject of bankruptcies throughout the United States.'"

The court in the case of *Jenks* v. *Title Guarantee & Trust Co.*, having held that the amendment of clause 2 of subdivision a of section 47 of the Bankruptcy Act vested the trustee in bankruptcy with all the rights, remedies and powers of the judgment creditor holding an execution duly returned unsatisfied, without an action having been brought in the first instance to recover a judgment, it seems to this court by analogy that where an application is made for leave to issue an execution under section 1391 the trustee, being vested with the same rights, duties, and privileges, is entitled to the order without a judgment having been procured.

In *Heppenstall* v. *Baudouine*, 73 Misc. Rep. 121, the court in considering these two remedies says: "The two remedies are not necessarily inconsistent and should, therefore, be held to be concurrent." The motion should be granted, without costs.

Motion granted, without costs.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff, *v.* EARL J. BELLINGER, Defendant.

(Supreme Court, Erie Special Term, August, 1917.)

Counterclaim — pleading — carriers — damages — Interstate Commerce Act.

In an action against a shipper to recover freight charges on an interstate shipment, the defendant may counterclaim for damages to the goods growing out of the shipment though under the Interstate Commerce Act freight charges can not be paid except in currency.*

* See *Wells, Fargo & Co.* v. *Cuneo*, 241 Fed. Repr. 727.— [REPR.

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DEMURRER to the several counterclaims set forth in the answer.

Harold J. Adams, for plaintiff.

L. L. Ottoway, for defendant.

SEARS, J. The plaintiff in this case brings this action to recover freight charges and the defendant has alleged in four separate counterclaims that the freight in question was damaged during transportation through the fault of the plaintiff. To these several counterclaims the plaintiff has demurred on several grounds, viz.: (1) That each counterclaim contains new matter and is insufficient in law upon the face thereof for the reason that a claim for loss, damage or injury growing out of a shipment of freight does not constitute a lawful offset against a claim of an interstate carrier for unpaid freight charges. (2) On the ground that the defendant has not the legal capacity to recover upon the case for the same reason. (3) That each counterclaim is not of the character specified in section 501 of the Code of Civil Procedure. As to two of the counterclaims the demurrer also is on the ground that such counterclaims do not state facts sufficient to constitute a cause of action.

There is one theory underlying all the demurrers and the various grounds stated, viz., that, inasmuch as freight charges cannot be paid except in currency and no other or different payment from that established by the freight tariffs or schedules is permissible, it would consequently defeat the purpose of the Interstate Commerce Act to allow a claim for damages by way of counterclaim to reduce the amount demanded for the freight charges. This contention is supported by three decisions in the District

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Court of the United States, viz., *Chicago & N. W. Ry. Co.* v. *Stein Co.*, 233 Fed. Repr. 716; *Illinois Central R. R. Co.* v. *Hoopes & Sons*, Id. 135; *Johnson-Brown Co.* v. *D., L. & W. R. R. Co.*, 239 id. 590. The theory is enunciated in this language in the *Stein* case: "Under the acts of Congress relating to the transportation of interstate commerce, as construed by the Supreme Court of the United States in *Louisville & Nashville Railroad Co.* v. *Mottley*, 219 U. S. 467, and in *Chicago, Indianapolis & Louisville Railway Co.* v. *United States*, 219 U. S. 486, the carriers cannot accept in payment for the transportation of interstate commerce anything but cash, and no contract, however fair, looking to the payment for such services by an exchange of commodities can stand. If a shipper may be permitted to set off, in an action for freight earned by the carrier, claims for damages which the shipper alleges that he has sustained, the court must prevent the usual right to make compromises of such suits, and must undertake the impossible task of holding the carrier to diligence and good faith in preparing and presenting its defenses, in order to prevent the granting and receiving of rebates by insidious agreement between the parties with reference to the disposition of the suit."

In this state such a counterclaim was undoubtedly allowable before the enactment of the Interstate Commerce Act. A claim for damages to goods grows out of the same transaction as the freight claim in respect to the carriage of the same goods. *Schwinger* v. *Raymond*, 83 N. Y. 192. There is no provision in our Code which restricts the right to plead such a cause of action as a counterclaim because of the theoretical objection set forth in the above mentioned federal cases. The practice of this court in relation to the allowance of a counterclaim must be governed by the

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Code of Civil Procedure and under that Code the counterclaims here in question are allowable. Code Civ. Pro. § 501.

In order to prevent a possible discrimination or rebating, it may be incumbent upon the courts to see to it that the action is properly prosecuted to judgment but it seems unnecessary to require two actions to be maintained and a payment of money to pass to and fro to accomplish what with care can as well be accomplished in the single action. The question here involved has arisen also in the state courts of Georgia and it has there been held that a similar counterclaim was allowable under the Georgia practice. *Battle* v. *Atkinson,* 9 Ga. App. 448; 11 id. 837. The Georgia court, in the former of the two opinions, said: "The very object of allowing pleas of recoupment and set off and of similar pleas is to prevent a multiplicity of suits, and to enable the court, when it has all the necessary parties before it, to adjudge all their respective rights and to render judgment which will finally end the controversies pending between them. Now, if the shipper had sued * * * in a separate action, and had recovered judgment for, say, $1,200, which he alleged to be the damage done to the shipment, and the carrier had paid over twelve one hundred dollar bills, there certainly would be nothing in the spirit or the letter of the act of Congress to prevent the shipper taking four of those bills and paying the carrier its claim for freight charges. The effect of the plea in the present case is simply a prayer on the defendant's part to be allowed to consummate this same end through the offices of the court which the plaintiff has invoked." The demurrer, therefore, is overruled, with ten dollars costs.

Demurrer overruled, with costs.

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Matter of the Application of WADSWORTH J. ZITTEL et al., Trustees of the City and County Hall, etc., Petitioners, for a Peremptory Writ of Mandamus against LOUIS P. FUHRMANN, Mayor, et al., Constituting the Council of the City of Buffalo, Respondents.

(Supreme Court, Erie Special Term, August, 1917.)

Mandamus — when application for, denied — municipal corporations — expenses connected with the maintenance of city and county hall borne equally by city of Buffalo and county of Erie — statutes.

Under a statute (Laws of 1880, chap. 31, § 4, as amended by chapter 83, Laws of 1892), providing that all the expenses connected with the maintenance of a city and county hall shall be borne equally by the city of Buffalo and the county of Erie, and that all appropriations therefor shall be paid to the trustees who shall yearly ascertain the amount required and certify the same to the board of supervisors of the county and to the common council of the city, and, further, that it shall be the duty of the said board of supervisors and the said common council to provide in equal proportions the amount of money required and place the same in the treasury of said city and county, respectively, subject to the order of the trustees for such purpose, the said common council in making appropriations for the ensuing year may take into consideration the unexpended balances of preceding years remaining in the hands of the trustees having charge of the building.

APPLICATION for a peremptory writ of mandamus to require the city council of the city of Buffalo to appropriate and pay into its treasury, subject to the order of the petitioners as trustees of the city and county hall, the city's equal proportion of the amount certified by the petitioners as such trustees to be required for such purposes, to wit, the sum of $37,500.

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Edward L. Jung, for petitioners.

Frank C. Westphal, assistant city attorney, for respondents.

SEARS, J. This is an application by the trustees of the city and county hall for a peremptory writ of mandamus to compel the city council of the city of Buffalo to appropriate and set aside in the city treasury the entire amount of the city's one-half of the sum certified by the trustees to the city council and the board of supervisors of the county of Erie as the necessary expenses for the maintenance, etc., of the city and county hall.

The statutory enactments providing for the appointment of the trustees of the city and county hall and declaring their powers and duties are contained in chapter 31 of the Laws of 1880, chapter 83 of the Laws of 1892, and chapter 114 of the Laws of 1913. The trustees are six in number, appointed by the Appellate Division of the Supreme Court for the term of six years, two of such trustees being appointed biennially. They serve without salary. They are given the general care and management of the city and county hall and its grounds. The trustees are required to keep a full account of their proceedings and exact and particular accounts of all their receipts and disbursements, which records and accounts shall at all times be open for inspection by the chairman of the board of supervisors of Erie county and by the mayor of the city of Buffalo and by any committee appointed by the board of supervisors of Erie county or by the common council of Buffalo, and it is expressly provided that no expenditures shall be incurred or payment made by the trustees unless approved by at least four of them.

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The particular question involved in this proceeding arises upon the interpretation of section 4 of chapter 31 of the Laws of 1880, as amended by chapter 83 of the Laws of 1892. The pertinent parts of section 4 are as follows: "All expenses incurred for the alteration, repairing, warming, lighting, cleaning, protection and care of said hall, and for the improvement, care and protection of the grounds for the site thereof, shall be borne equally by the city of Buffalo and the county of Erie, and all appropriations therefor, shall be paid to said trustees and be disbursed by them for such purposes * * * They shall yearly ascertain the amount required for the purposes aforesaid, and certify the same to the board of supervisors of said county, and to the common council of said city. They shall yearly make to the board of supervisors of said county and to the common council of said city a detailed report of the money disbursed by them during the year preceding. And it shall be the duty of the board of supervisors of said county, and the common council of said city, to provide in equal proportion the amount of money required for the purposes aforesaid, and place the same in the treasury of said city and county, respectively, subject to the order of said trustees for such purpose."

For some years the trustees have each year certified to the respective county and city authorities that the amount ascertained by them to be necessary for the next year's running expenses was $75,000 and the trustees have this year ascertained the amount required to be the sum of $75,000 and certified the same to the supervisors and the city council. It further appears that in several of the years last past the disbursements of the trustees did not exhaust the sum appropriated and that the city and county, instead of keeping the money in the city and county

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treasurers' hands, respectively, have paid over the money to the trustees who have deposited the entire appropriated sum in city banks and that there has resulted, through thrift and economy of the trustees, a fund amounting to about $56,000 remaining over from former appropriations of the city and county and from the sale of disused furnishings, etc., after the disbursements for the care of the hall have been fully met. When, therefore, this year the trustees ascertained the amount required for necessary expenses for the succeeding year to be $75,000, the city council, taking into consideration the fund already in the hands of the trustees, appropriated the additional sum of $15,000 only, which, with one-half of the said fund, would place in the control of the trustees for the city's one-half of the necessary running expenses for the succeeding year the sum of about $43,000 or about $5,500 in excess of the sum which the trustees certified that they had ascertained to be the sum required for the ensuing year's running expenses. I do not understand that the city council, by this action, intended any criticism of the trustees or intended thereby to attack the trustees' judgment of the amount required for the annual running expenses. It is quite true, as stated by the trustees' counsel in his written argument, that during a period of more than forty years the city and county hall has been cared for and managed under such statutes by successive trustees, all of whom have been and are among the most reputable, highly esteemed and substantial citizens of Buffalo and Erie county, performing their functions without remuneration, except the consciousness of duty well done, as a matter of civic pride and obligation, with signal success and economy. The city council, by its action in making only the appropriation mentioned above and in opposing this appli-

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cation, is attempting to correct what the councilmen believe to be an improper and illegal practice which has grown up without fault on the part of anybody, but the respondents do contend that the fund now in the hands of the trustees, resulting from unexpended balances of preceding years, is in equity the property of the city and being in the hands of the trustees can be taken into consideration by the city council in making the appropriation of the amount required for the running expenses for the ensuing year.

It is not necessary to determine whether or not the city council and the board of supervisors can go behind the certificate of the trustees, because, so far as this proceeding is concerned, that certificate is accepted by the city as full, accurate and complete, and the only question is whether the city council, in making the appropriation, can take into consideration the moneys already in the trustees' hands. I am of the opinion that it can.

It will be noticed that the terms of the statute above quoted require the city and county to provide in equal proportions the amount of money required for the purposes aforesaid, *and place the same in the treasury of the said city and county, respectively, subject to the order of said trustees for such purpose.* This provision would continue the city and county in control of the money appropriated, while leaving the disbursement of the same in the hands of the trustees. I cannot but think that had this method been pursued, rather than the method of paying over to the trustees the entire amount of the appropriation, the unexpended balance each year remaining in the hands of the city would have been taken into consideration in the appropriation for the ensuing year. It is true that there is no provision in the act requiring the repayment to the city and county of the unex-

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pended balance of sums appropriated, or its surrender into the general city and county funds, but this would not be necessary if the funds remained in the hands of the city and county authorities.

There is no purpose in allowing the accumulation of a fund in the hands of the trustees. According to the theory of the trustees, they have the right to certify to the city and county any sum which they find to be required and their certificate the city and county have no authority to question. If this is so, the trustees have the entire reservoir of the city's and county's wealth to draw upon and there is absolutely no reason why a part of this should be appropriated and held in a special fund from year to year under the trustees' exclusive control.

Even if the city should be held to have a right to go behind the trustees' certificate and make an original determination of the amount necessary for the running of the hall, nevertheless, the statute is clear that the city and county must provide in equal proportions the amount of money required for the purposes of maintenance, protection, improvement and care of the hall.

Considering, therefore, that no authority is expressly given for the accumulation or retention of such a fund; that no purpose is served thereby; that the duties of the trustees can be performed unhampered without such fund; and considering further that the accumulation of such a fund deprives the taxpayers of the use of such fund, I am of the opinion that the existence of such a fund may be considered by the city and county authorities in making their annual appropriation and that this application must be denied.

Application denied.

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LOUIS V. SCHUTRUM, JR., et al., Plaintiffs, v. BUFFALO WHOLESALE HARDWARE COMPANY, Defendant.

(Supreme Court, Erie Special Term, August, 1917.)

Injunctions — to stay execution of warrant pending appeal — landlord and tenant — summary proceedings — City Court Act of Buffalo — Code Civ. Pro. § 2265(2).

The City Court Act of Buffalo (Laws of 1909, chap. 570, as amended) providing a comprehensive plan for stays of execution of orders and judgments appealed from of all kinds, a motion under section 2265(2) of the Code of Civil Procedure, for an injunction to stay the execution of the warrant pending an appeal from a final order of the City Court of Buffalo in a summary proceeding to dispossess plaintiffs as tenants holding over after the expiration of the term, will be denied.

MOTION for a temporary injunction.

Frank C. Brendel and Harry Lipsitz, for plaintiffs.

Kent, Cummings & Smith, for defendant.

SEARS, J. This is an action brought by the plaintiffs to enjoin the defendant from interfering with the plaintiffs' possession of certain premises in the city of Buffalo. A final order in a summary proceeding to dispossess the plaintiffs upon the application of the defendant has been granted by the City Court of Buffalo and the purpose of this motion is to stay the execution of the warrant pending an appeal from such final order. The order of the City Court was granted upon a finding that the term of the plaintiffs as tenants of the premises in question had expired and application for the injunction is made in this equitable action in accordance with subdivision 2 of section 2265 of the Code of Civil Procedure.

In opposition to the motion for an injunction, the defendant calls the attention of the court to sections 55 and 56 of the City Court Act (Laws of 1909, chap.

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570 as amended*). The parts of these sections applicable are as follows:

"§ 55. *Appeals.* Appeals in civil causes may be had from judgments of said court or final orders or orders affecting a substantial right to the supreme court, Erie county, upon questions of fact or of law in the same manner and with like effect as appeals are now had by law to the county court from justices' court judgments. * * * The appellate courts may affirm, reverse or modify the judgment or order appealed from or grant a new trial in the city court, and may stay all proceedings under the judgment or order appealed from pending appeal * * *."

"§ 56. *Code, rules of supreme court applicable; when.* The provisions of the code of civil procedure and rules and regulations of the supreme court as they may be from time to time, shall apply to the city court of Buffalo as far as the same can be made applicable and are not in conflict with the provisions of this act; in case of such conflict this act shall govern."

Section 55 of the City Court Act provides a comprehensive plan for obtaining stays of execution of orders and judgments appealed from of all kinds. It is subject to no exception. The motion for a stay under this section of the City Court Act is made to the same tribunal to which an application for an injunction would be made under the Code section above referred to. It seems plain, therefore, that a stay of the execution of the order of dispossession in a proper case can be granted in the original proceeding now in the Supreme Court upon appeal. This is an adequate remedy. *Wordsworth* v. *Lyon,* 5 How. Pr. 463. The motion for an injunction in this equitable action, therefore, must be denied, with ten dollars costs of motion.

Motion denied, with costs.

* See chapter 188 of the Laws of 1915.—[REPR.

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JOHN F. JONES, Plaintiff, v. CLARE A. PICKARD, Defendant.

(Supreme Court, Erie Special Term, August, 1917.)

False imprisonment — allegations of complaint in action for — trial — jury — damages — pleading — executions — malice.

In an action for false imprisonment it is not necessary to show want of probable cause or malice in the sense of ill-will or even recklessness.

In such an action, the jury may consider the quality of the act and the intent with which it was done and, if it is found that there was ill-will or recklessness involved, to award punitive damages, and it is only to meet the claim for such damages that mitigating circumstances may be shown.

The complaint in an action for false imprisonment alleged substantially that the defendant wantonly and recklessly caused an execution against the person of the plaintiff to be issued without lawful authority and in violation of the laws of the state of New York and of the United States and in violation of the rights and the liberties of the plaintiff, by which he suffered great indignities and was in prison in a certain designated county jail. As a partial defense and in mitigation of damages the answer alleged that defendant was of the opinion that the execution mentioned in the complaint and growing out of a judgment recovered by him against plaintiff in a certain action in which plaintiff herein was plaintiff and defendant herein and others were defendants was a proper process to be issued and delivered to the sheriff in actions of the kind and character upon which said execution was issued; that it was issued by defendant herein without any malice and in the orderly course of his business; and it was further alleged in and by said partial defense that any act or deed of defendant in connection with the issuance of the execution referred to in the complaint did not cause plaintiff herein any damages whatsoever or affect in any way his character or standing in the community in which he resided. The character of the previous action was not stated and there was no allegation showing the reason for the alleged opinion of defendant. *Held,* that a demurrer to said partial defense will be sustained.

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DEMURRER to a separate partial defense.

Robert H. Jackson and Benjamin S. Dean, for plaintiff.

Albert E. Nugent, for defendant.

SEARS, J. This action is for false imprisonment, the complaint alleging substantially that the defendant wantonly and recklessly caused an execution against the person of the plaintiff to be issued without lawful warrant or authority and in violation of the laws of the state of New York and of the United States and in violation of the rights and liberties of the plaintiff, by virtue of which the plaintiff suffered great indignities and was imprisoned in the Chautauqua county jail.

The partial defense to which plaintiff demurred is in the following language: "For a further answer to said complaint and as a partial defense thereto, and in mitigation of damages, this defendant respectfully shows to this court and alleges (a) that this defendant was of the opinion that the execution mentioned in plaintiff's complaint, and growing out of a judgment recovered by this defendant against plaintiff in an action in which John F. Jones was plaintiff and this defendant, Clare A. Pickard, and others were defendants, was a proper process to be issued and delivered to a sheriff in actions of the kind and character upon which said execution was issued; that it was issued by this defendant without any malice and in the orderly course of this defendant's business; (b) that this defendant alleges that any act or deed of his in connection with the issuance of said execution referred to in said complaint did not cause the plaintiff herein any damages whatsoever or affect in any way his character or standing in the community in which he resided."

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Section 536 of the Code authorizes the pleading of mitigating circumstances in an action for a wrong in the following language: "In an action to recover damages * * * for a personal injury * * * the defendant may prove, at the trial, facts, not amounting to a total defence, tending to mitigate or otherwise reduce the plaintiff's damages, if they are set forth in the answer, either with or without one or more defences to the entire cause of action." The question is whether the partial defense demurred to complies with the provisions of this section.

To justify a recovery in an action for false imprisonment it is not necessary to show a lack of probable cause or malice in the sense of ill-will or even recklessness. The tortious quality of the act is necessarily involved in the intentional commission of the act itself. This idea is often expressed by saying that the act itself imports malice. Actions for libel and slander are similar in this respect. The saying of the defamatory words or the publication of the defamatory article is there the gist of the cause of action and imports a wrongful quality. Nevertheless, in actions for false imprisonment, as well as in actions for libel and slander, it is permissible for the jury to consider the quality of the act and the intent with which it is committed and, if it is found that there was ill-will or recklessness involved, to base on such finding an award of punitive damages. It is to meet the claim for punitive damages and such claim only that mitigating circumstances are allowed to be shown. The actual wrong which is done by libel, slander or false imprisonment is not subject to mitigation. The wronged person is entitled to be fully compensated for his actual injury, but if the person who committed the wrong can show, not a full excuse, but something which tends in that direction, the jury is entitled to

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consider it in determining whether payment of smart money is to be imposed.

In *Bennett* v. *Smith,* 23 Hun, 50, Mr. Justice Landon expressed these ideas as follows: "In libel and slander the damages may embrace two items, namely, compensatory and punitive. (*Bush* v. *Prosser,* 11 N. Y. 347.) The law implies damage from the injury done. (*Sanderson* v. *Caldwell,* 45 N. Y. 398.) If the defendant lacks a legal excuse for his libel of the plaintiff, the law presumes malice, and the defendant ought to respond to the full extent of the actual injury done the plaintiff; that is, compensatory damages should be given. But if, in addition to this malice which the law presumes, and which may be merely constructive and passive in fact, the jury should find that the defendant was actuated by active and vindictive malice, then they may give, in addition to the actual damages, punitive damages. These are not given as the actual due of the plaintiff, but awarded him, that the defendant may be punished and a wholesome example afforded * * *. To avoid this, he is permitted to plead and prove matters in mitigation of damages. The strictly compensatory damages ought not to be mitigated, else the defendant might cast the consequences of his wrong upon the plaintiff. But the strictly punitory damages may be mitigated. These depend upon the malice of the defendant, and malice depends upon the motive with which the libel was published. If the motive was good, the malice for which the defendant must respond may be existent by operation of law merely, and not by force of evil passions moving the defendant to wish and to do the plaintiff a wrong. The law, it must be borne in mind, presumes the existence, not the character, of the defendant's malice. That character, therefore, becomes a material fact in the case, and hence the defendant's motive or intent equally material."

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Chief Judge Ruger, in *Bradner* v. *Faulkner*, 93 N. Y. 515, referring to the same general subject, said: "It is of the essence of mitigating circumstances that they do not constitute a total defense to the action, but are those facts from which the party acting upon them might reasonably suppose that the offense, for the punishment of which the prosecution was instituted, had been committed by the defendant therein. It also follows, from this fact, that the rules by which the sufficiency of a pleading is ordinarily determined, viz., materiality and relevancy, cannot be applied in all of their strictness to a partial defense by way of mitigating circumstances * * *.

"It is competent for the defendant, even if he has been guilty of causing the illegal imprisonment of the plaintiff, to prove in mitigation of damages that what he did, was done without malice, and for what he had a right to suppose was reasonable cause for his action."

The pleading in question alleges that an action was previously brought by this same plaintiff against this same defendant and that in that action the defendant recovered a judgment, and, further, that it was the defendant's opinion that the judgment was of such a character that the execution was a proper process in an action of such kind, and that it was issued without malice. The plaintiff urges that the mistaken opinion of the defendant is immaterial and cites the maxim that ignorance of the law excuses no one. This objection is not sound. The opinion is not offered as a complete excuse. No right is here sought to be based upon this opinion. But the defendant contends that his reasonable mistake as to the law should prevent his being punished His contention is supported by the language of Chief Judge Ruger in *Bradner* v. *Faulkner, supra:* "It must be borne in mind that this

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court has decided that the facts alleged against the plaintiff did not bring him within the jurisdiction of the board of supervisors, but that decision does not preclude the defendant from proving his belief in those facts, and his honest conviction that they rendered the plaintiff liable to the penalties imposed by the act of 1858." See, also, *Bisbey* v. *Shaw,* 12 N. Y. 67.

The difficulty with the defense, however, is that the character of the previous action is not stated and for all that appears it may have been an action upon a promissory note. While pleadings are now liberally construed, the courts are not authorized to supply omissions. Without some allegation showing the reason for the alleged opinion, the opinion is not shown to be other than reckless itself.

In *Bennett* v. *Smith, supra,* Judge Landon said: "Let us assume that the defendant could not believe the charges made by him respecting the plaintiff unless he had previously seen or heard something tending to satisfy him of their truth (*Hatfield* v. *Lasher,* 17 Hun, 23; affirmed in Court of Appeals; *Bush* v. *Prosser,* 11 N. Y. 347); and that it therefore follows that, as a condition precedent to his right to testify to his belief in the truth of the charges, he should adduce the facts inducing his belief. (*Willover* v. *Hill,* 72 N. Y. 36.)"

The further allegation in the answer that the execution was issued without malice must be read in connection with the rest of the partial defense. In *Morgan* v. *Bennett,* 44 App. Div. 323, a partial defense to a libel suit was interposed as follows: "That the publication complained against was made without the knowledge, consent or assent of the defendant and at a time when he was absent from the city of New York and was in Europe, and without the personal knowl-

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edge of defendant and without malice." The demurrer thereto was sustained.

While it is competent for a person charged with a wrong to take the witness stand and deny the intent to commit the crime (*Bennett* v. *Smith, supra; Lally* v. *Emery,* 79 Hun, 560; affd., 151 N. Y. 653; *McKown* v. *Hunter,* 30 id. 625; *Noonan* v. *Luther,* 206 id. 105; *Jarrell* v. *Young, Smyth Field Co.,* 105 Md. 280; 23 L. R. A. [N. S.] 367), nevertheless, to make a similar denial in a pleading material, it must be founded upon some fact to explain it and give color to the mental attitude.

The allegation that the execution was issued in the ordinary course of business amounts to nothing. It is of the same class as the partial defense to which a demurrer was sustained in *Morgan* v. *Bennett, supra;* and the allegation that there were no damages is nothing more than a denial of damages and has no place in an affirmative defense or partial defense.

The demurrer, therefore, is sustained, with ten dollars costs, but with permission to the defendant to amend his pleading within ten days after the service upon him of a copy of the order sustaining the demurrer.

Demurrer sustained, with costs.

HONORA MAY O'BRIEN, Plaintiff, *v.* JOHN BERNARD MANNING, Defendant.

(Supreme Court, Queens Trial Term, August, 1917.)

Marriage — action for breach of promise of — damages — trial — when motion to set aside verdict granted.

Where in an action for breach of promise of marriage plaintiff, who was twenty-nine years of age, admits that she did not love defendant who, though eighty-four years old and very rich, maintains considerable vigor though partially palsied, and it appears that there was no period of courtship or engagement,

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that the plaintiff sustained no loss of social position, no loss of a chance to marry another, and incurred practically no expense in preparation, her only elements of damage being her mortification and wounded pride, and the loss of benefits she would have had, a verdict in her favor of $225,000, of which $25,000 was awarded as punitive damages and the balance as compensatory damages, will be reduced to $125,000, and in the event that plaintiff does not accept such reduction a motion to set aside the verdict and for a new trial will be granted.

MOTION to set aside a verdict.

Stephen C. Baldwin, for plaintiff.

Martin W. Littleton, for defendant.

CROPSEY, J. The only question arising on the motion to set aside the verdict is whether it is excessive. The jury awarded the plaintiff $225,000 damages. They divided this sum and stated that $25,000 of it was as exemplary or punitive damages and $200,000 as compensatory damages.

In actions for breach of promise of marriage the amount of the damages is peculiarly one for a jury's determination. While the rule of law which defines the elements of damage is clear, the opinions as to the amount of such damages will vary greatly. So appellate courts seldom interfere with the amount of the verdict in such an action. And the trial courts do not interfere either if there is any reasonable basis upon which the verdict could have been found, and there is no reason to believe the jury was swayed by sympathy or prejudice or passion.

The defendant is very rich, but very old, and these and other facts put this case in a class by itself and no other case to which attention has been called is an aid in determining this motion. This case, fortunately, is free of the harrowing circumstances that not infrequently are present in actions of this character,

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and which naturally and properly increase the damages. It also lacks a number of elements of damage which are usually present. Here the plaintiff admitted she did not love the defendant, and so there was no wounding of the affections. She is twenty-nine years of age and the defendant is eighty-four, and while he maintains considerable vigor he is partially palsied. There was no period of courtship or engagement. The offer and the promise were to be followed in a few days by the ceremony, and in that short interval the breach occurred. The plaintiff sustained no loss of social position, no loss of a chance to marry some one else, and she incurred practically no expense in preparation. Her only elements of damage were her mortification and wounded pride, and the loss of benefits she would have had. Necessarily the loss of benefits is the principal factor in her damages. As said in *Wolters* v. *Shultz,* 1 Misc. Rep. 196, 199, 200: "If a plaintiff enters into a marriage engagement from mercenary motives only, she may still recover, if she intended and was willing to carry out the agreement; but in such event the damage should not exceed the actual pecuniary loss or outlay, since disappointed love of defendant's money furnishes no ground of legal redress, and she could not justly complain that defendant's conception of the contract, or his standard of duty was not higher than her own."

What "pecuniary loss" has the plaintiff here suffered? That is measured in part by the defendant's means, but other elements enter into it. The age of the defendant, his health and probability of life, his manner of living, his social status, his generosity or his niggardliness, these are also to be considered. *Bennett* v. *Beam,* 42 Mich. 346. While there is no direct proof of defendant's means, his reputed wealth is from $15,000,000 to $20,000,000, and, as he took the

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witness stand in his own behalf and did not say how much he was worth and did not deny that he was as rich as he was reputed to be, it can safely be assumed the reputed figures do not overstate the size of his fortune. *Chellis* v. *Chapman*, 125 N. Y. 214, 221. The evidence shows that the defendant lived very simply, that he was most frugal and economical, even parsimonious, and did not live on any scale commensurate with his great wealth. Nor did he hold any prominent social position, such as is not infrequently acquired by persons who are the possessors of large fortunes.

The conditions under which the plaintiff would have lived had she married the defendant are plainly set forth in the proof. It is manifest that the great wealth of the defendant would not have been of corresponding benefit to the plaintiff. The worldly advantage she would have obtained by becoming his wife would probably have been no greater than if he was worth only $1,000,000. A possible inheritance or gift by will cannot be considered as an element of damage. An inchoate right of dower might be so considered, for that is determined upon marriage and cannot be taken away, but there is no proof here upon which to make an award for such a loss. Beyond a certain figure, additional wealth does not furnish the basis for increased damages in such cases. Then, too, the age and probability of life of the defendant must be considered. The plaintiff's loss of benefits would be measured in length of time by the life of the defendant. Under the mortality tables his probability of life is limited to a few years. Under these conditions the sum awarded for compensatory damages, namely, $200,000, seems grossly excessive. By no reasonable possibility on the evidence in the case

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could the plaintiff have suffered in " pecuniary loss " to such an extent.

Evidence was introduced on the trial which naturally aroused a feeling against the defendant. There was no objection made to its admission and so no error arises, but it is not unlikely that it accounts for the size of the verdict. And now the reference is not to the matters set up in the answer. It is to the proof that the defendant strangled his daughter's pet dog, for no reason apparently except he did not approve of dogs, and that he was expelled from the stock exchange for altering some certificates, and that he had been sued by his former wife for a separation, on charges of cruelty and non-support. These matters necessarily prejudiced the jury against the defendant, even though it was done unconsciously, and they must account for the result.

The jury were instructed under what circumstances they could award exemplary damages, and they were fully justified in so doing. The charges against the plaintiff, made by the defendant in his answer, were untrue and were known by him to be untrue at the time. As he admitted on the stand they were put in the answer " to protect " himself against the claim made by the plaintiff. Such a step was unjustified; it was even inexcusable. It was vicious, and showed an utter disregard of the plaintiff's rights and feelings. It merited punishment and so an award of exemplary damages.

The verdict must be reduced to $125,000, or if the plaintiff does not accept such reduction within ten days after the service of a copy of the order to be entered hereon a new trial must be granted. Execution of the judgment will be stayed for thirty days after notice of its entry.

Ordered accordingly.

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EUGENE LAMB RICHARDS, as Superintendent of Banks, Plaintiff, *v.* CHARLES M. SCHWAB et al., Defendants.

(Supreme Court, New York Special Term, September, 1917.)

Evidence — considered in action by superintendent of banks to enforce statutory liability of stockholders — pleading — dismissal of complaint — banks.

The evidence in an action brought by the superintendent of banks to enforce the statutory liability of the stockholders of the "Carnegie Trust Company" in liquidation, considered, and the complaint dismissed on the merits as to certain of the defendants and judgment directed in favor of plaintiff against the other defendants.

ACTION by the superintendent of banks to enforce the statutory liability of the stockholders of the Carnegie Trust Company in liquidation.

Carmody, Kellogg & Gormly (Joseph A. Kellogg and Wilbert Ward, of counsel), for plaintiff.

Collin, Wells & Hughes (John L. Wells, of counsel), for Robert W. Bunton, Albert E. Chandler, Ernest L. A. Christianson, Thomas O'Connor, Irving E. French, William L. Laws, John F. Martin, G. Tracey Rogers, Warren L. Samson and John P. Schmitt.

Stanchfield & Levy (John L. Wells, of counsel), for defendant Joseph B. Reichmann.

Fitch & Grant (Grant C. Fox, of counsel), for defendants Frank L. Williams, Jacob Ruppert, Herbert Turrell, Lawrence A. Ramage and Noyes Palmer, as trustee, etc.

Holm, Whitlock & Scarff (Donald C. Strachen, of counsel), for Samuel H. Kress and George C. Leubbers.

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Willard A. Mitchell, for Charles M. Schwab.

Masten & Nichols, for defendants Sylvanus Schoonmaker, Agnes M. Laying and James D. Laying, Jr., as executors and trustees under the last will and testament of James D. Laying, deceased.

H. Francis Dyruff, for defendant Edith C. Watson.

O'Gorman, Battle & Vandiver, for defendants Stanton C. Dickinson and John J. Dickinson, executors of the estate of Charles C. Dickinson, deceased.

William F. S. Hart, for Edward F. Hutton, Franklyn Hutton, George A. Ellis, Jr., Edward E. B. Adams, Hosmer J. Barrett, copartners doing business under the firm name of E. F. Hutton & Co.

Barber, Watson & Gibboney (Charles E. McMahon, of counsel), for defendant William J. Hance.

Stephen H. Keating, in person.

Dennis & Buhler, for Philip Ruxton.

Walter F. Peacock, for Pauline Horn Drew.

Bergen & Prendergast, for defendant Sarah P. Kalbfleisch.

Elkus, Gleason & Proskauer (Joseph Proskauer and Wesley S. Sawyer, of counsel), for estate of James Talcott, deceased.

Charles Goldzier, for Julius Alsberg and others.

Rogers & Rogers (Gustavus A. Rogers, of counsel), for defendant Robert L. Smith.

Frank A. Gaynor, for Lucy Lyon Kerr.

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Everett, Clark & Benedict (W. F. Allen, of counsel), for defendant Annie N. Alexander, as executrix of the last will and testament of Thomas Alexander, deceased.

McElheny, Bennett & Sicher (William M. Bennett, of counsel), for defendants Thomas J. Hallewell and Robert E. Henry.

George C. De Lacy, for Jefferson Livingston.

Henry S. J. Flynn, for defendants Louis H. Zother, John W. Bohlmann and Helen Gorsch, as executors and trustees under the last will and testament of Hugo Gorsch, deceased.

William B. Walsh, for defendant William A. Lockwood.

Johnson & Mills, for defendant Phipps, as executrix.

Wakelee, Thornall & Weight (C. E. Thornall, of counsel), for defendant Henry A. Bingham.

John W. Collopy, Jr., for defendant Philip J. Josey, Jr.

Ellison & Ellison (Benjamin F. Allen, Jr., of counsel), for defendant John F. Makley.

Elbert B. Hamlin, for Grace Georgette Dickinson, as executrix of the estate of Charles C. Dickinson, deceased.

J. E. R. Carpenter, for Robert B. Knowles.

Cornell, Lockwood & Jeffrey (John L. Lockwood, of counsel), for Fannie E. Stephens.

B. W. B. Brown, for B. R. Robinson.

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Baldwin & Hutchins, for Phœnix Insurance Company and Henry B. Spencer.

Enos S. Booth and Vance Hewitt, for defendant Walter G. Jones.

Swan, Moore & Danforth (Joseph R. Swan, of counsel), for Stamford Trust Company.

Leon M. Woodworth, for defendants Irene S. Hunter and Samuel E. Hunter.

Joline, Larkin & Rathbone (Albert J. Stickney, of counsel), for Anson W. Burchard and Frederick H. Cumming.

Clarence M. Lewis, for defendants Seligsberg and Henry.

Herzfeld & Sweedler, for defendant Robert S. Kunkel.

Paul M. Crandell, for defendant Coulter.

M. Steuer, for defendant Frieda Hart.

DONNELLY, J. This is an action brought by the superintendent of banks of New York, pursuant to authority conferred on him by section 19 of the former Banking Law, to enforce the statutory liability of the stockholders of the Carnegie Trust Company in liquidation. On or about the 7th day of January, 1911, the superintendent of banks, pursuant to law, took possession of the assets and liabilities of the Carnegie Trust Company for the purpose of liquidating the same. Afterwards, and on or about the 12th day of November, 1912, he mailed to all the stockholders of record of the Carnegie Trust Company a notice requiring them to pay an assessment to the full amount of the

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par value of the stock held by them in said company. This action was commenced on the 6th day of January, 1913, by the delivery of the summons to the sheriff of the county of New York for service and the defendants in the action were served either personally or by publication thereafter. Of nearly 250 defendants served about 120 have appeared and pleaded by some 73 attorneys, setting up various defenses. Most of the questions of law raised by the pleadings have been disposed of by appeals in this and other litigations brought by the superintendent of banks under the same section of the Banking Law. The questions of law presented, in so far as they affect generally all the parties defendant, were formally raised on the trial by motions to dismiss, both at the end of the plaintiff's case and at the end of the entire case. Decision was reserved on both of these motions in order to allow counsel to submit briefs relative thereto. In order to avoid unnecessary repetition I shall first take up *seriatim* the general grounds advanced for the dismissal of the complaint, merely giving citations where specific grounds have been passed upon by the courts in this and other actions, and I shall then take up the special defenses raised by individual defendants which are peculiar to their cases respectively. *General Defenses.— First.* That no default has been shown in the payment of any debts or liabilities contracted by the Carnegie Trust Company as of special date, and that as of that date there were existing debts of the corporation, and that such debts amounted to the outstanding capital stock, namely, $1,500,000, or any other sum, in accordance with the provisions of section 196 of the Banking Law upon which this action is based. It appears from the evidence that the superintendent of banks took possession of the assets and property of the Carnegie Trust Company for the

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purpose of liquidation, as above stated, on January 7, 1911, and that such possession has been continued by his successors in office for a like period. It further appears that at the time the complaint was drafted and on or about November 29, 1912, the substantial assets of the company amounted to $2,400,000 and the liabilities to $4,502,933.63. It likewise appears from the certificate of the superintendent of banks (exhibit 10) under date of November 13, 1916, that the assets of the Carnegie Trust Company on that date amounted to $454,157.07, and the liabilities to $4,190,141.60, to which must be added interest of $1,540,758.66. This proof, being uncontradicted, is sufficient to establish a *prima facie* case. Banking Law, § 80; *Richards* v. *Scharmann,* 97 Misc. Rep. 143; *Richards* v. *Robin,* 178 App. Div. 535; N. Y. L. J., July 9, 1917. See, also, opinion of Justice Erlanger in the case of *Richards* v. *Robin,* N. Y. L. J., March 27, 1915. *Second.* That this action was not brought in the name of the Carnegie Trust Company according to the provisions of section 19 of the Banking Law in effect at the time this action was commenced and upon which this action is based. This question has likewise been decided adversely to the defendants in the cases *Van Tuyl* v. *Schwab,* 165 App. Div. 412; *Matter of Union Bank,* 204 N. Y. 313, and *Van Tuyl* v. *Scharmann,* 208 id. 53. *Third.* That the Carnegie Trust Company was not organized under the Banking Law of the state of New York, but was organized under a special act of the state legislature, and that therefore section 196 of the Banking Law has no application, and, if it has, it is subject to the limitations prescribed in section 59 of the Stock Corporation Law. It is true that the Carnegie Trust Company was created by special laws (see Laws of 1898, chap. 599; Laws of 1899, chap. 293; and Laws of 1906, chap. 147), but it is provided by

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section 7 of chapter 599 of the Laws of 1898 as follows: "The rights, powers and privileges herein granted to said corporation shall not be controlled, limited or restricted by any existing statute or law of this state; but so far as such statute or statutes of law are or might otherwise be inconsistent with the provisions of this act or any of them they are and shall be deemed to be altered and amended so far as they are or might be applicable to said corporation, so as to conform to the provisions of this act which provisions shall be in lieu of all provisions in said statutes relating to the same subject matter. *Except as last above provided and except upon subjects or matters relating to which special provision is made in this act, the said corporation shall be subject to and entitled to the benefits of all general laws of this state relating to corporations and applicable to such corporations.* The amendment of any such general laws shall not be deemed to be intended to amend any of the express provisions of this act unless such intention is clearly expressed in the act or acts making such amendment of such general laws." It will thus be seen that by the terms of the special act above quoted the provisions of the general law so far as they were not inconsistent with the provisions of the special act were applicable to this corporation from its inception as provided both by the special act and by the general law. In numerous cases the courts have applied the provisions of general laws to the Carnegie Trust Company, and, while it is claimed that the courts have not specifically and definitely passed upon this point, it is to be noted that in the recent case of *Madison Trust Co.* v. *Carnegie Trust Co.*, 215 N. Y. 483, the court after reciting the special acts creating the Carnegie Trust Company proceeded to consider the application of the general provisions of the Banking Law to this cor-

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poration. In regard to the question whether or not the superintendent of banks is subject to the restrictions contained in section 59 of the Stock Corporation Law, the Court of Appeals in the case of *Van Tuyl* v. *Scharmann,* 208 N. Y. 53, definitely held that he was not and that: "The statute of 1908 expressly repealed all acts and parts of acts inconsistent therewith, and in unmistakable language conferred authority upon the superintendent of banks, if necessary to pay the debts and liabilities of a trust company, to institute action in his official capacity to enforce the liability imposed upon the stockholders thereof by section 196 of the Banking Law, *unhampered by any limitations contained in the Stock Corporation Law or the fact that the charter of the company had not been dissolved by judgment of the court.*" *Fourth.* That sections 19 and 196 of the Banking Law are unconstitutional in that they deprive stockholders of their property without due process of law, in that they impair the obligation of the defendants' contract with the Carnegie Trust Company, as stockholders and depositors, and also the contract existing between the Carnegie Trust Company and the state of New York, created by the law and authorizing the incorporation of the Carnegie Trust Company. This ground must also be held to be untenable, as section 7 of article VIII of the Constitution of the state of New York reads: "Liability of stockholders of banks. § 7. The stockholders of every corporation and joint-stock association for banking purposes, shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind." The same question has been raised by demurrer and decided adversely to the contention of the defendants in the cases of *Van Tuyl* v. *Robin,* 80 Misc. Rep. 362; *Van Tuyl* v. *Kress,* 171

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App. Div. 908, 944; *Carnegie Trust Co.* v. *Kress,* 215 N. Y. 706, affg. 167 App. Div. 903, and has also been passed upon by the United States Supreme Court in the case of *State Sav. & Commercial Bank* v. *Anderson,* 238 U. S. 611, affg. 165 Cal. 437. By the latter decision the United States Supreme Court affirmed without opinion the decision of the Supreme Court of the state of California sustaining the action of the superintendent of banks of California in taking possession of the State Savings and Commercial Bank of San Francisco under the California Banking Act, an act which closely follows the Banking Law of this state. *Fifth.* That the defendants have not waived a jury trial by any of the methods prescribed under section 1009 of the Code of Civil Procedure and that they are therefore entitled to a jury trial for the reason, as they allege, that this case is not equitable in its nature and that before it can come into equity there must be some equitable ground, such as equitable parties, or equitable subject-matter or there must be equitable relief demanded. This question likewise has been adjudicated in this department. In this very action a motion was previously made before Mr. Justice Bijur to strike the case from the calendar on the ground that the defendants were entitled to a jury trial. Mr. Justice Bijur denied the motion. An appeal was taken to the Appellate Division by the defendant Kress. That court, in an opinion written by Mr. Justice Page, affirmed the order made by Mr. Justice Bijur. See *Van Tuyl* v. *Kress,* 172 App. Div. 563. *Sixth.* That the plaintiff has not complied with the conditions prescribed by law as precedent to his right to maintain this action, in that he has not collected and liquidated the assets of the Carnegie Trust Company. It seems to be the settled law of the state that the fact that unliquidated assets remain to be

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liquidated and applied to debts constitutes no defense to this action. See *Barnes* v. *Arnold,* 23 Misc. Rep. 197; affd., 45 App. Div. 314; 169 N. Y. 611; *Pearsons* v. *Gardner,* 42 App. Div. 490; *Van Tuyl* v. *Scharmann,* 208 N. Y. 53; *Kennedy* v. *Gibson,* 8 Wall. 498. *Seventh.* That the action is barred by the Statute of Limitations. As the record stands there is no merit in this defense *Special Defenses.*—A. That where stockholders paid to the Carnegie Trust Company for their stock an amount in excess of the par value of such stock the liability imposed on such stockholders should be reduced to the extent of such excess payment. The defendants who raise this defense have cited in support thereof no case directly in point. The cases of *Tucker* v. *Gilman,* 121 N. Y. 189; *Rochester & K. F. Land Co.* v. *Raymond,* 158 id. 576; *Briggs* v. *Penniman,* 8 Cow. 386, and *Garrison* v. *Howe,* 17 N. Y. 458, 461, in no way involve the provisions of the Banking Law, fixing the liability of stockholders and directors of banking corporations, but refer to business and manufacturing corporations, and therefore cannot be held to control the construction to be given to the statute in question. The statute fixes the liability of stockholders of a banking corporation, and creditors of such a corporation in this state are entitled to know those who, as shareholders, have pledged their individual credit as security for its debts, engagements and its contracts. They are not obliged to ascertain whether a stockholder has paid to the bank more than the par value of the stock held by him any more than they are required to ascertain whether a stockholder has paid an assessment on his stock after having paid to the bank the par value thereof. It is not a question of contribution between stockholders, where one has contributed money by assessment or otherwise for the purpose of meeting

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the claims of creditors, but is simply a question of statutory liability, which is fixed and definite, and upon which creditors doing business with the bank have a right to rely. B. That certain defendants are entitled to set up as a defense or counterclaim debts owed by the Carnegie Trust Company to them, consisting of deposit balances, check collections, etc., or alleged claims for services rendered by them to said company. These defenses were disposed of in the case of *Van Tuyl* v. *Schwab,* 165 App. Div. 412, wherein the court says: "It is to be noted that the alleged claim of the defendant against the trust company is not pleaded as an equitable set-off. No liability is admitted, and the prayer for judgment is that the complaint be dismissed and a recovery had for the full amount claimed. It is good neither as a defense nor counterclaim. If the defendant has a cause of action it is against the trust company and not the plaintiff. He is merely a custodian and liquidator of the trust company, and an action cannot be maintained against him upon a claim existing against the trust company which he is liquidating. *Lafayette Trust Co.* v. *Higginbotham,* 136 App. Div. 747; *Richardson* v. *Cheney,* 146 id. 686; affd., *sub nom. Richardson* v. *Van Tuyl,* 208 N. Y. 541." C. That certain defendants herein should be relieved of liability, notwithstanding the fact that certain shares of stock stand in their names on the books of the Carnegie Trust Company, because they either held such stock as collateral security for money loaned or they acted as agent for a principal in the transaction, or became record owners thereof at the request of their respective employers or through their coercion. In the case of *Van Tuyl* v. *Robin,* 160 App. Div. 41; affd., 211 N. Y. 540, Justice Dowling, writing for the court, says: "By section 2 of the Banking Law (Cons. Laws, chap.

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2; Laws of 1909, chap. 10, as amd. by Laws of 1910, chap. 126) a stockholder is thus defined: 'The term "stockholder," when used in this chapter, shall apply not only to such persons as appear by the books of the corporation to be stockholders, but also to every owner of stock, legal or equitable, although the same may be on such books in the name of another person, but not to a person who may hold the stock as collateral security for the payment of a debt.' * * * We believe, therefore, that the true meaning of section 2 of the Banking Law is to define stockholders as including (1) Every person who appears by the books of the corporation to be a stockholder; *and* (2) Every owner of stock, legal or equitable, though the same may be of record in the name of another, *except* a person who holds stock as collateral for security for the payment of a debt. Thus the first class is without exception; the second has but one exception. The second class is not a limitation of the first, but an addition to it. The respondents herein come within the first class, for they were stockholders of record. The exception, applicable only to the second class, does not apply to or save them harmless from liability. That would only be the case if they were owners of the stock for the purpose indicated, but were not owners of record." As the defendants herein are stockholders of record, under the authority above quoted, the plaintiff is entitled to judgment against them for the relief demanded in the complaint. D. That the liability of a stockholder in a banking corporation under section 196 of the Banking Law is contractual in its nature, and that therefore a discharge in bankruptcy of a stockholder of such a corporation upon a petition filed and an adjudication made after said corporation had become insolvent relieves said stockholder of his obligations and liability as such for the debts of the corporation,

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because his liability on the date of the filing of the petition in bankruptcy was provable as a debt against his estate. I hold this defense to be good on authority of *Van Tuyl* v. *Schwab,* 174 App. Div. 665; affd., 220 N. Y. 661, and as to those defendants who have availed themselves of it the complaint is dismissed. Upon the stipulation of facts filed by the plaintiff and the defendant Edith C. Watson I find in favor of the plaintiff and against the defendant. The special defense of Annie N. Alexander, as executrix, etc., is predicated on the contention that the order dated March 6, 1914, authorizing the service of the supplemental summons herein by publication, or at the option of the plaintiff, by the service of said supplemental summons and a copy of said supplemental complaint and of said order without the state personally upon the said defendant, is invalid and should be vacated and set aside. This is the second time this identical question has been raised before me. Heretofore a motion was made to vacate and set aside said order of publication while I was sitting in Special Term, Part I. The motion was denied by an order duly entered herein dated June 7, 1914. An appeal was taken therefrom to the Appellate Division, and the Appellate Division affirmed said order without opinion. See *Van Tuyl* v. *Schwab,* 164 App. Div. 933. The decision of the learned Appellate Division is the law of the case so far as this particular question is concerned. I therefore find the special defense of Annie N. Alexander as executrix, etc., to be untenable and find in favor of the plaintiff and against her for the relief demanded in the complaint. Upon the stipulation of facts filed by the plaintiff and the defendant William A. Lockwood, I find that this defendant was neither the legal nor the equitable owner of ninety shares of the capital stock of the Carnegie Trust Company

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standing on the books of said company in the name of the defendant Charles W. Eastman, nor had he any legal or equitable interest therein at the time the plaintiff or his predecessor in office took charge of the affairs of said company, as alleged in the complaint herein, or at any time subsequent thereto. Said defendant Lockwood is therefore entitled to judgment dismissing the complaint on the merits. See *Richards* v. *Robin,* 175 App. Div. 296. Upon the stipulation of facts entered into between the plaintiff and the defendant F. B. H. Paine, I find against the defendant and in favor of the plaintiff on authority of *Van Tuyl* v. *Robin,* 160 App. Div. 41, and *Richards* v. *Robin, supra.* The evidence adduced on the trial by the defendants Dickinson and Josey raises a nice question under the authorities. It appears from the evidence that on the 29th day of April, 1910, Charles C. Dickinson, the defendants' testator, entered into a written agreement wherein he contracted to sell to John B. Reichmann, W. J. Cummins, Martin J. Condon and Charles A. Moore, Jr., president of the Carnegie Trust Company and directors thereof, respectively, 2,202 shares of the capital stock of said company, 1,032 shares thereof representing the said Dickinson's individual interest and 1,170 shares being owned by his relatives. He further agreed under said contract to sell to the purchasers above mentioned other shares not exceeding 758 in number, owned by persons thereafter named, provided said persons, or any of them, desired to sell. On May 23, 1910, the time set for the execution of this contract was, by a supplemental agreement in writing, extended from May 18, 1910, to July 18, 1910. On May 24, 1910, the said Charles C. Dickinson died. Letters testamentary were thereafter issued to Stanton C. Dickinson and John J. Dickinson, as executors, and Grace Georgette Dickinson, as executrix, of his

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estate. Prior to July 18, 1910, to wit, on the 20th day of June, 1910, Stanton C. Dickinson, then being one of the executors of the estate of Charles C. Dickinson, deceased, claims he delivered to Joseph B. Reichmann, who was then president of the Carnegie Trust Company, 2,222 shares of the capital stock of said company, representing 2,202 shares belonging to the estate of Charles C. Dickinson, deceased, and the members of the Dickinson family, and 20 shares owned by the defendant Josey and sold under the option clause relative to 758 shares above mentioned, and received in payment therefor, in addition to cash, certain agreements and notes, the payment of each of which was guaranteed by the said purchasers, and that this stock was thereafter taken from the office of the president of the Carnegie Trust Company and deposited in the trust department of said company under "Trust No. 61" and "Trust No. 1." He further claims that at or about the time of the delivery of said stock, he, the said Stanton C. Dickinson, informed Robert B. Moorhead, secretary of the Carnegie Trust Company, that the stock in question had been sold and delivered to and paid for by Mr. Reichmann and his associates, and had been placed in the trust department of the company, and that he asked the secretary to transfer the stock on the books of the corporation out of the names of Charles C. Dickinson and his relatives and into the names of the purchasers aforesaid. A similar conversation is claimed to have been had by the defendant Josey with Mr. Moorhead with reference to his 20 shares of stock sold under said agreement, and it is further claimed that the secretary assured them that he would attend to the matter as soon as the stock was delivered to him. As a matter of fact, 1,742 shares of said capital stock were transferred on the books of the company out of the names of the Dickinson

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owners. It appears, however, that 460 shares belonging to the decedent and 20 shares belonging to the defendant Josey were not so transferred, and the plaintiff seeks to hold these defendants as stockholders to the extent of these 480 shares. The defendants invoke the rule laid down in *Whitney* v. *Butler*, 118 U. S. 655, and *Richards* v. *Robin*, 178 App. Div. 535; N. Y. L. J., July 9, 1917, and claim that, notwithstanding the provisions of the Banking Law, inasmuch as a sale of the stock had taken place and the stock had been actually delivered or came into the possession of the bank, and the sellers had requested the bank to transfer the stock on the books of the corporation, the bank had knowledge of the sale and of the purchasers of the stock and should have transferred the same on its books; that the sellers had done all in their power that could reasonably be expected of them to effect the transfer of record of such stock, and that they should therefore be relieved from liability as stockholders with reference to the shares in dispute. The difficulty, however, in this case is that, even if the cases last cited are applicable, it is doubtful whether the proof establishes the physical delivery to the bank which would enable it to make the transfer if it saw fit to do so. The delivery to Reichmann on June 20, 1910, did not include the 460 Dickinson shares in dispute, and was made to the defendant Reichmann as representative of the syndicate which was purchasing the control of the company, pursuant to the agreement of sale, and was not a delivery to the bank. The deposit of the stock in the trust department was made for safekeeping, and indicates that something was left to be done before the delivery to the bank was completed. From the entries made under "Trust No. 61" and "Trust No. 1" of the Carnegie Trust Company, and introduced in evidence by the defendant Dickinson,

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the following items appear: "1910. June 29. Union Stock Yards Bank of Buffalo. Capital stock of the Carnegie Trust Co. Cert. 700 n/o C. C. Dickinson — 35 shares. Cert. 472 n/o C. C. Dickinson — 75 shares. Note of C. C. Dickinson for $15,000 due on demand, 6% interest — date March 21st, 1910. Above stock and note deliverable to S. C. Dickinson, executor, estate C. C. Dickinson, upon payment of draft of $15,347.50 on or before July 18, 1910. July 22, 1910. Returned by registered mail to Union Stock Yards Bank of Buffalo." "1910. July 18. Fifth Ave. Bank. Capital stock of the Carnegie Trust Co. Cert. 1361 n/o C. C. Dickinson — 100 shares. Cert. 1360 n/o C. C. Dickinson — 100 shares. Held in safekeeping. S. K. receipt No. 4 issued. Delivered to 5th Ave. Bank July 27, 1910, upon surrender of receipt." "1910. July 18. W. H. Wadhams. Capital stock of the Carnegie Trust Co. Cert. 1363 n/o C. C. Dickinson — 50 shares. Cert. 1362 a/o C. C. Dickinson — 100 shares. Held in safekeeping. S. K. receipt No. 5 issued. Delivered July 27, 1910, to M. J. Lyman for W. H. Wadhams, upon surrender of receipt." It thus appears that 460 of the Dickinson shares — the shares in dispute — were not even delivered to Mr. Reichmann at the time the other shares were delivered and at the time Stanton C. Dickinson stated to Secretary Moorhead that he desired to have this stock transferred on the books of the corporation out of the names of Dickinson and his relatives and into the names of the purchasers; that a note had to be paid with reference to 110 shares, and that safekeeping receipts had been given for 200 shares and 150 shares respectively. Likewise, there is no proof that the certificates of stock were duly indorsed in a manner which would authorize the bank to make the transfer. In the case last cited an official of the bank stated as a matter of

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fact that the stock had been transferred, and the court held that the defendant in that case was justified in relying upon such statement. But here there was no such representation. The transaction at the time of the notice was not completed. All the secretary of the bank said was that he would transfer the stock when it was delivered to him and it appears from the evidence in the case that instead of being delivered to him the 460 Dickinson shares in question were returned to three different groups of people or corporations, and in view of the decision in *Van Tuyl* v. *Robin,* 160 App. Div. 41, which declares all stockholders of record to be subject to the liability of stockholders, and the decision in *Richards* v. *Robin,* 175 App. Div. 296, which holds that "It is as much the right and duty of the transferror of shares of stock to procure the proper transfer to be made upon the books of the corporation as it is of the transferee," I find in favor of the plaintiff and against the defendants Dickinson and Josey. Judgments directed in accordance with the foregoing, with costs to the successful parties, respectively. Proposed findings passed upon. Submit for my signature, upon eight days' notice of presentation, a complete copy of the decision, which shall embody without change of language all findings made by me at the request of any party, with proof of service on the other side. In order that this may be done the papers have been returned to the custody of the clerk.

Ordered accordingly.

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LEON SAMSON by BARNET SAMSON his Guardian ad Litem, Plaintiff, *v.* THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, Defendant.

(Supreme Court, New York Special Term, September, 1917.)

Injunctions — when denied — Columbia University — resistance to draft ordained by lawful authority.

Where a student at Columbia University, in the course of a public address in which he counseled resistance to the draft ordained by lawful authority, said "We have no love for the kaiser; but as much as we hate the German kaiser we hate still more the American kaiser," and, further, that there had been draft riots in the Civil War but there would be a draft revolution during the war of 1917, and a report of the meeting at which the address was made appeared in the public press the next day, a motion for an injunction *pendente lite* in an action to procure a decree requiring the university to allow him to continue in the institution as a student after notice that he would not be permitted to receive any further instruction therein will be denied.

MOTION for an injunction *pendente lite.*

Doubin & Liebman (Louis B. Doubin, of counsel), for plaintiff.

John B. Pine, for defendant.

MULLAN, J. The plaintiff brings this action to procure a decree requiring Columbia University to allow him to continue in that institution as a student, and he makes this motion for the relief he seeks *pendente lite.* At some time prior to September 26, 1916, the date not being stated in the papers, the plaintiff, while a student at the College of the City of New York, was suspended by the faculty thereof for creating a disturbance at a general meeting of the students of that college, on the occasion of an address by General Leonard Wood on the subject of preparedness. Just

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what he did does not appear. He later applied to the defendant university for admission as a student, and he was so admitted on September 26, 1916, entering the upper division of the sophomore class. In February, 1917, he was graduated from the sophomore class into a junior class, and at the close of the academic year of 1916–1917 he was a member of the junior class, having successfully completed his studies in the lower division of that class. After the conclusion of that academic year, and on June 14, 1917, the defendant, through its acting dean, notified plaintiff that he would not be permitted to receive any further instruction at Columbia University. The reasons assigned by the defendant for its refusal to allow the plaintiff to continue as one of its students are that on June 11, 1917, the plaintiff made an address at an "Emma Goldman" meeting, held in the Royal Lyceum, No. 10 West One Hundred and Fourteenth street, in which he said: "We have no love for the kaiser; but as much as we hate the German kaiser we hate still more the American kaiser;" that he also said on that occasion that there had been draft riots in the Civil War, but that there would be a draft revolution during the war of 1917, and that the following report of the meeting was published in the New York *Times* of June 12, 1917: "At 8 o'clock Sampson arose to open the meeting. * * * In his opening harangue he devoted much of his time to the Workmen's and Soldiers' Council of Russia. He announced that he was about to organize such a council to run things in the United States. * * * He said the time had come when 'we are going to refuse to stand up and shoot down our brothers.' The war, he declared with great solemnity, is a 'dollar war,' and he reached his climax by prophesying a draft riot which would be more than a riot. 'It's going to be a draft revolution,' he said. He is

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also quoted as saying: 'As much as we hate the German kaiser, we hate still more the American kaiser.' " and that a similar report of that meeting was published in the New York *World* of June 12, 1917. The plaintiff in his replying affidavit alleges that the newspaper account of his speech was a garbled version, but it is significant that he makes no denial that the published account correctly represented the substance and spirit of his address, and that he does not state what it was he did say on the occasion in question. The defendant urges three grounds for the defeat of the plaintiff's motion: *First,* that as the plaintiff had completed his studies for the academic year for which he had been admitted, his contract with the university had expired; *second,* that plaintiff was admitted only on probation and upon the express understanding that he " should not engage in any activities or take part in any movement which would involve the university in undesirable notoriety;" and, *third,* that the refusal of the university to allow the plaintiff to continue as a member of its student body was a proper exercise of the discretion and disciplinary power necessarily vested in an institution of learning, and actually conferred by its charter upon the defendant, and controlled by by-laws of its making that I deem it unnecessary to refer to in detail. Considering these grounds in the order stated, I incline to the view that while in a strict sense a student contracts with an institution of learning for only a given part of a course, usually measured by the period of an academic year, the circumstances frequently permit of the implication that the institution had obligated itself — subject, of course, to changes of plan, curriculum and the like — to permit a student in good standing to continue the particular course for which he has entered, upon payment of the necessary fees and compliance with other

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reasonable requirements. At least, it would seem that a strong argument may be made for such a rule of construction. But as I think the relief the plaintiff here seeks must be denied upon another ground I shall not pursue further the inquiry upon this head, but shall resolve the doubt in the plaintiff's favor for the purpose of this motion. Coming to the defendant's second ground of opposition, it is to be noted that the statement of the university's secretary upon the subject contains nothing more than the bare allegation that the plaintiff was admitted on probation, as hereinbefore mentioned, without any supporting or evidentiary facts, and that the plaintiff flatly denies that there was any agreement or stipulation whatsoever upon the subject of his future conduct. If I considered a determination of that question of fact necessary to the decision here, I should ask for further affidavits, but I have concluded to decide the motion upon the third ground, namely, that dealing with the disciplinary powers of the defendant over its student body. Assuming, then, that the plaintiff is correct in his assertion that a contractual relationship subsisted between him and the university after the close of the past academic year, I think it is plain that it was one of the implied terms of the agreement that the plaintiff would comport himself in such manner as not to destroy or interfere with the discipline, good order and fair name of the university which had admitted him as one of the students. As was said by Mr. Justice Patterson, in the case of *Goldstein* v. *New York University,* 76 App. Div. 83: "Obviously and of necessity there is implied in such contract a term or condition that the student will not be guilty of such misconduct as would be subversive of the discipline of the college or school, or as would show him to be morally unfit to be continued as a member thereof. The power of

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suspension or expulsion of students is an attribute of government of educational institutions." The question for determination here is, therefore, Has the plaintiff been guilty of such misconduct as to disentitle him to be continued, or has he shown himself to be morally unfit to be continued, as a member of the student body of the defendant? "Misconduct" perhaps refers more particularly to demeanor within the walls of the institution or in connection with the ordinary activities of student life, and of improper practices by the plaintiff in that regard there is no claim made here. But the implied stipulation of good conduct, variable in its meaning and incapable of precise definition as that term must always be, is not, I think, to receive the restricted construction that the student's conduct may be the subject of control only in so far as it relates to his actions in his capacity and status of student. The term "morally unfit," as used by Mr. Justice Patterson, must be given the broader meaning and should be construed as comprising any conduct that may interfere with or injure the university, or lessen its proper control over its student body, or impair its influence for good upon its students and the community. Viewing the matter in that light, I think it will be conceded that the duty of an institution of learning is not met by the mere imparting of what commonly goes under the name of knowledge. By the common consent of civilized mankind through the ages, not the least important of the functions of a school or college has been to instil and sink deep in the minds of its students the love of truth and the love of country. Is such conduct as that of the plaintiff calculated to make it more difficult for the defendant university to inculcate patriotism in those of its student members — if there be such unfortunates — who are without it? Does language of the sort used

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by the plaintiff at public meetings — for I assume that he is in substance correctly quoted — make him a real or potential menace to the morale of the defendant's student body and a blot on the good name of the famous and honored university whose degree he seeks? There may be two answers to those questions, but I see only one. We are a tolerant people, not easily stirred, prone to an easy-going indulgence to those who are opposed to the very essentials and vitals of our organized social life, but there must of necessity be a limit somewhere to the forbearance that can with safety be extended to the forces of destruction that hide behind the dishonestly assumed mask of the constitutional right of free speech. To attempt to state in general terms the difference between an honest and a dishonest exercise of the wholesome right of free speech that our Constitution so completely and properly protects would be as vain as it would be unprofitable here. In some cases, in many cases perhaps, reasonable men would differ. But in some cases reasonable men could not differ, and I think we are dealing with such a case here. To counsel resistance to the draft ordained by lawful authority in accordance with our form of government is as culpable as it is cowardly; and one who does so is doing the work of the enemy without — thus far, at least — incurring the risks and braving the dangers that are the accepted lot of an enemy who is recognized as such because he has the courage openly to avow his true allegiance. Whether the plaintiff's conduct comes within the accepted definitions of sedition or treason, I have not concerned myself to inquire. It suffices me that he and his kind are attempting to make unsuccessful a war that this our country has declared and is waging. That it should be made impossible for such a person to remain at liberty to make common cause

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with our enemy is the view of many, but that consideration is beyond the scope of this inquiry. What I have to do with is the question of whether the plaintiff's continuance at Columbia University, with the inevitably close contact in which that would place him with impressionable young men of his own age who might thus be inoculated by him with the poison of his disloyalty, is likely to constitute a menace to the university. I think it would, and that the defendant was well within its rights in refusing further to extend to him its privileges and opportunities.

Motion denied, with ten dollars costs.

HUDSON VALLEY RAILWAY COMPANY, Plaintiff, *v.* MECHANICVILLE ELECTRIC LIGHT AND GAS COMPANY, Defendant.

(Supreme Court, Saratoga Trial Term, September, 1917.)

Trial — action to recover for loss of horse — negligence — judgments — nonsuit — evidence — jury.

At the time of the killing of a horse belonging to A, by coming in contact with a live telephone wire belonging to plaintiff herein which had burned and fallen so that the ends reached the ground, the defendant was maintaining a heavily charged electric light wire just above the telephone wire and which sagged thereon. In an action to recover for the loss of the horse, which resulted in a judgment in favor of plaintiff therein, notice to defend was served on defendant herein, but it did not, and it appeared without contradiction that the defendant in that action knew that the electric light wire sagged and that it did nothing to protect its wire, and by the charge to the jury defendant's liability was predicated upon its knowledge of the danger of the situation, coupled with its failure to exercise proper precautions to prevent accident. The defendant against whom the judgment was recovered paid it, and brought the present action to recover the amount paid, claiming that

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the death of the horse was caused primarily by the negligence of the defendant in the present action, and on the trial, over objection, plaintiff herein was permitted to show that it did exercise some precautions to protect its wires from the electric light wire. Pending the decision of a motion for nonsuit at the close of plaintiff's case and at the close of all the evidence, the jury on the submission of certain questions found that the accident was caused by the contact of the wires; that plaintiff exercised reasonable care; that defendant did not; that its negligence was the prime and efficient cause of the accident and that the damages were a certain sum. On granting defendant's motion for a nonsuit, *held*, that, as the action was based upon the judgment rendered in the action to recover for the loss of the horse, plaintiff herein could not deny or contradict the facts upon which that judgment was recovered with other facts but must accept the findings there made upon the questions there litigated and determined.

That the answers of the jury to the questions submitted relating to plaintiff's care and to the primal and efficient cause of the accident must be set aside on the law.

ACTION for negligence.

James McPhillips, for plaintiff.

Robert Frazier, for defendant.

WHITMYER, J. A horse, belonging to one Florence McMahon, was killed on South Main street, in Mechanicville, N. Y., on September 27, 1913, by a current of electricity from plaintiff's telephone wire, which had been burned in two and had fallen, so that the ends reached the ground. The horse came in contact with it. At the time of the occurrence, defendant was maintaining a heavily charged electric light wire just above the telephone wire and this had sagged upon it. After the occurrence, Mrs. McMahon brought an action for negligence against plaintiff to recover for the loss of the horse. Plaintiff served notice upon defendant to defend, but defendant did not. The

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action resulted in a judgment against plaintiff for $355.60, which plaintiff paid, without taking an appeal. And plaintiff has now brought this action against defendant to recover the amount paid, with interest from November 13, 1915, claiming that the death of the horse was caused primarily by the negligence of defendant. On the other trial, it appeared without contradiction that this plaintiff knew that the electric light wire had sagged and that it did nothing to protect its wire. Upon that, the court charged the jury as follows: "Now you have heard the evidence of the witness for the defendant that the defendant company knew that these electric light wires did sag and that they did not protect their telephone wire from the electric light wires. In the exercise of reasonable prudence should they have done it? If you determine that they should, then find a verdict for the plaintiff in the sum of $225.00. If you determine that they were not called upon to do anything but took the chance of their wires being burned off and falling down in the street injuring somebody, why then find for defendant." So that plaintiff's liability was predicated upon its knowledge of the danger of the situation, coupled with its failure to exercise proper precautions to prevent accident. On this trial, plaintiff was permitted to show, under objection, that it did exercise some precautions to protect its wire from the electric light wire. Defendant moved for a nonsuit at the close of plaintiff's case and at the close of the evidence. Decision was reserved and, pending same, certain questions were submitted to the jury, which found that the accident was caused by the contact of the wires, that plaintiff exercised reasonable care, that defendant did not, that defendant's negligence was the prime and efficient cause of the accident, and that the damage was $373.38. Defendant then

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renewed its motion for a nonsuit and plaintiff moved for a general verdict.

The action is based upon the judgment in the McMahon case. That being so, plaintiff may not deny or contradict the facts, upon which it was recovered, with other facts, but must accept the findings there made upon the questions there litigated and determined. *Fulton County Gas & Electric Co.* v. *Hudson River Tel. Co.*, 200 N. Y. 287, 296; *Larkin* v. *Terminal Warehouse Co.*, 161 App. Div. 262. Judge Collin, writing in the former case, says: "The facts upon which the judgment in the Horning action was recovered are an essential and ineradicable part thereof, which the plaintiff may not deny, contradict, abandon or supplant with other facts. * * * If this defendant is by that judgment concluded on the question of Horning's damages and this plaintiff's liability, this plaintiff is concluded thereby as to the ground of its liability as found by the verdict of the jury and is not permitted to free itself from such verdict and the ground thereof or reopen the issues litigated and adjudicated in the action in which the judgment was rendered." In the McMahon action, the jury found that this plaintiff knew about the dangers of the situation and that it failed to do anything to guard against same. The questions relating to this defendant's negligence and to the liability as between these parties were not litigated. In this action, the findings are that this plaintiff exercised reasonable care, that this defendant did not, and that defendant's failure so to do was the primal cause of the accident. The finding as to defendant was based upon its knowledge of the situation and its failure to guard against same. While the question of the liability as between these parties may be litigated here, through evidence not produced in the other action, nevertheless, the

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facts found there may not be contradicted, but are controlling here. The parties, then, are *in pari delicto*. *Larkin* v. *Terminal Warehouse Co., supra.* So that the answers here to the questions relating to this plaintiff's care and to the primal and efficient cause of the accident must be set aside, on the law, and defendant's motion for a nonsuit must be granted.

Motion granted.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* OTTO BRENNEAUER, Defendant.

(Supreme Court, Chautauqua Special Term, September, 1917.)

Indictment — action to dismiss, denied — grand jury — larceny — evidence — motions and orders.

Where by an indictment drawn in the usual common law form defendant was charged in the first count with the crime of grand larceny in the first degree in having stolen from a corporation of which he was sales manager certain blue prints worth more than $500, and the grand jury was warranted by the evidence before it in finding that defendant when he received said prints from the company's service engineer, who had the care and custody of them, intended to appropriate them to his own use, the count is good as charging larceny at common law, and a motion to dismiss the indictment will be denied.

The second count of the indictment charging defendant with criminally receiving stolen property, first degree, in that he did feloniously buy, receive and have the same blue prints then and there well knowing them to have been feloniously stolen, dismissed as not supported by the evidence before the grand jury.

MOTION to dismiss indictment.

Louis L. Thrasher, for motion.

Warner S. Rexford, assistant district attorney, opposed.

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COLE, J. The grand jury of Chautauqua county presented an indictment against the above named defendant charging him in the first count thereof with the crime of grand larceny in the first degree in the usual common law form, in having stolen from the Gurney Ball Bearing Company "eight blue prints, formulae, designs and documents, numbered B-1 to R-11, of the value of more than $1,000.00."

In a second count the indictment charges the said defendant with the crime of "criminally receiving stolen property, first degree," in that he "did feloniously buy, receive and have" the same property "then and there well knowing the said goods, chattels and personal property to have been feloniously stolen."

An order has been granted permitting the defendant to inspect the minutes of the grand jury for the purpose of moving to dismiss the indictment, and a motion is now made for such dismissal based upon the evidence before the grand jury as disclosed by such minutes.

It is the duty of the grand jury to find an indictment "when all the evidence before them taken together is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury."

If the evidence falls below this standard the indictment may and should be dismissed. *People* v. *Glen,* 173 N. Y. 403; *People* v. *Sexton,* 187 id. 511; *People* v. *Sweeney,* 213 id. 37.

It is now urged by the defendant that the indictment should be dismissed for the following reasons:

First. That the evidence is insufficient to support either the crime of grand larceny, committed by any means or in any manner, or the crime of criminally receiving stolen property.

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Second. That in any event the evidence is insufficient to support the crime of grand larceny *as charged in the indictment.*

The facts disclosed before the grand jury and upon which the indictment rests are briefly as follows:

The Gurney Ball Bearing Company is a corporation engaged in the manufacture of ball bearings for use in automobiles, with its factory at Jamestown. Its sales of its products during the two years last past approximate $2,000,000 annually. It had in its possession in its engineering department certain blue prints and drawings containing valuable manufacturing data essential in the making of its Gurney Ball Bearing known as the "Radial Thrust Bearing." These blue prints and data and secret information contained therein represented what it had taken many years to develop. There are only six or eight competitors of the company in this country. The deduction is well warranted by the evidence that these blue prints because of the data which they contained and the information which they afford would have been of great value to its competitors, as it had been to the company. Its chief engineer, who had developed this ball bearing and these blue prints through a period of several years, testified before the grand jury "in a month any ball bearing manufacturer — any of these six or eight ball bearing manufacturers in this country — by the use of that information could manufacture that bearing. At present they cannot manufacture it because they have not that information." He testified that the value of these blue prints would be "at least more than $500."

The defendant has been in the employ of the company for five or six years as its sales manager. The company's president testified before the grand jury: "Mr. Brenneauer was sales manager of the company,

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receiving a very large salary; a confidential position; one of trust."

Soon after he entered the employ of the company he asked its chief engineer, Mr. Gurney, for the information contained in these blue prints and repeatedly made the same request, but it was never given to him. At about the last holiday season he obtained a vacation and went to New York ostensibly to visit his wife. He came back from New York on January 3, 1917, and on his return went to the office and asked Mr. Barringer, the service engineer of the company, if he could get for him (the defendant) a set of the Gurney Radial Thrust Ball Bearings, and the engineer showed him the book in his (the engineer's) immediate possession, and the defendant took therefrom the blue prints numbered B-1 to B-11 and put them in his pocket. Later in the same day at a hotel in Jamestown he told Mr. Barringer that he intended leaving the company, and tried to induce Mr. Barringer to leave also, and requested that the conversation be treated strictly confidential. He took these blue prints to New York and after being there about two weeks returned, leaving them in his apartment at New York in the possession of his wife.

Upon the defendant's return from New York about two weeks later the president of the company, Mr. Smith, learned from Mr. Barringer of the fact of the defendant having taken these blue prints, and at once went to the office of the company and found the defendant in the act of leaving the office. When questioned about the blue prints he at first denied any knowledge concerning them, but on being pressed said he would produce them, and on further pressure admitted they were with his wife in New York, and he then authorized their delivery to a representative of the company.

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The charge in the second count of the indictment, of criminally receiving stolen property, is not sustained by the proof and this count in the indictment should be dismissed. If the property was stolen by any one, it was by himself, and he could not be convicted of criminally receiving stolen property from himself. *People* v. *Brien*, 53 Hun, 496.

It is urged that the evidence fails to show that the blue prints possess any value other than nominal, and that the element of value, essential to the crime of grand larceny in the first degree, is not sustained by the proof.

In the light of the testimony before the grand jury that body was warranted in finding that those prints were worth upwards of $500. The chief engineer of the company so testified. He gave his reasons therefor, to wit, that any manufacturer of ball bearings with these prints, and the information which they contained, could in thirty days manufacture this same bearing.

The learned counsel for the defendant urges that the prints contained *information* only, and that *information* as such possesses no intrinsic value, and that the paper on which it was entered possesses only nominal value. It appears, however, that the information and data when entered on these prints possessed and were of great value to a manufacturer of ball bearings. I conclude that the element of value is well established by the evidence. The grand jury were warranted by the evidence in finding that the defendant intended to deprive the company of this property, or of the use and benefit thereof. The crime of grand larceny in the first degree is established by the evidence, and in the absence of explanation or contradiction (which of course may be afforded upon a trial) the grand jury were warranted in finding an

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indictment for the crime and in the degree charged. The defendant's learned counsel urges, however, that the crime *as charged* is unsupported by the evidence. The count charging grand larceny is in the usual common law form, charging that the defendant "feloniously did steal, take and carry away" the property described. At common law and under the statute in this state prior to the adoption in 1881 of the Penal Code (now known as the Penal Law), the felonious taking necessary to the crime involved a trespass. Where the property was voluntarily parted with, even though as a result of fraud or false pretenses, the crime of larceny was not committed and where the *possession* was voluntarily parted with, in the absence of any trick, fraud or device to procure such possession, there was no larceny. If the owner was induced to part with the *property as distinguished from its possession merely, by false representations,* such act constituted the crime of obtaining property by false pretenses, and not larceny. 2 Bish. Crim. Law, § 813; *People* v. *Miller,* 169 N. Y. 339; *Smith* v. *People,* 53 id. 111.

If property lawfully in the possession of another as clerk or servant of any private person or copartnership, or as officer, agent, clerk or servant of an incorporated company was lawfully appropriated to his own use by such person, such appropriation constituted embezzlement under the statute in force in this state prior to the adoption of the Penal Code, and such statute with slight variations follows the provisions of the act of 39 George III, chapter 85, from which it was in some measure taken.

Neither of these acts, to wit, the acquisition of the property under false pretenses, nor the appropriation by a clerk, servant or agent having possession thereof by virtue of his employment, etc., constituted larceny.

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Upon the adoption of the Penal Code all these distinctions were swept away and these several crimes were comprehended under the definition of larceny.

By section 528 of the Penal Code (now section 1290 of the Penal Law) larceny may now be committed:

First. By the same acts or means as before the Penal Code.

Second. By the means which formerly constituted embezzlement.

Third. By what was formerly the separate crime of false pretenses.

Fourth. By what formerly amounted to no more than a simple breach of trust.

By section 275 of the Code of Criminal Procedure the indictment must contain: "A plain and concise statement of the *act* constituting the crime."

By section 279: "The crime may be charged in separate counts to have been committed in a different manner, or by different means."

But where the crime is charged to have been committed by a particular means or in a particular manner, the charge is not supported by proof that it was committed by other and different means, or in some other manner.

Since the adoption of the Penal Code it has been repeatedly held that an indictment charging larceny in the common law form is not supported by proof showing the crime of larceny by false pretenses or by what formerly constituted the crime of embezzlement. *People* v. *Dumar,* 106 N. Y. 502; *People* v. *Miller,* 169 id. 339; *People* v. *Cohen,* 148 App. Div. 205; *People* v. *Dilcher,* 38 Misc. Rep. 91.

No false representations were used in this case.

The foregoing conclusions therefore lead us to the inquiry, do the facts appearing before the grand jury constitute the crime of larceny under the law as it

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existed before the adoption of the Penal Code? If so, the crime *as charged* is supported by the evidence. Or do those facts show the crime of larceny by what formerly constituted either embezzlement, or a simple breach of trust?

As already stated, at common law a trespass was an essential element of a felonious taking. 2 Bish. Crim. Law, § 811.

This simple rule, however, was involved in many refined and technical distinctions. Where the owner was induced to part with the *possession* (as distinguished from the title) to the property by means of a trick, fraud or device, by one who took it *animo furandi* and appropriated it, this was not a voluntary parting with the possession and the crime of larceny was therefore complete. 2 Bish. Crim. Law (7th ed.), § 813; *People* v. *Miller*, 169 N. Y. 339; *People* v. *Call*, 1 Den. 120; *Smith* v. *People*, 53 N. Y. 111.

In the present case there is no evidence that the defendant obtained the property by means of any trick, fraud or device. The essential difference between the crime of larceny at common law by one who was a servant, and the crime of embezzlement as defined by our statute (2 R. S. 678) prior to the adoption of the Penal Code is this: If the servant had *possession* of the property by virtue of his employment (as distinguished from the bare *custody* or *care* thereof) upon appropriation thereof to his own use he committed the crime of embezzlement, and not of larceny. If, however, the servant had the bare *care* or *custody* of the property as distinguished from its possession, or if they were in his possession for a specific purpose, and he took the same *animo furandi* and converted it to his own use, he was guilty of larceny. The possession of the property under such circumstances is the possession of the master. This

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distinction is clearly recognized and maintained by text writers and by an unbroken line of decisions in our own state. 2 Bish. Crim. Law (7th ed.), §§ 824, 827, 832; *People* v. *Call*, 1 Den. 120; *People* v. *Bennett*, 37 N. Y. 117; *People* v. *McDonald*, 43 id. 61; *Phelps* v. *People*, 72 id. 365; *People* v. *Wood*, 2 Park. Cr. 22.

The rule is thus stated by Mr. Bishop in his learned treatise on Criminal Law (Vol. 2 [7th ed.], § 824): "There is a difference between a custody and a possession. For example: Goods in the custody of a servant are in the possession of the master. The servant may, therefore, commit larceny of them; as if a clerk in a store feloniously removed goods from it, this is larceny; * * * And, generally, where one has the bare charge or care of effects which belong to another, whether his relation to the owner be that of a servant or not, 'the legal possession * * * remains in the owner and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use.'"

And again at section 832 of the same volume: "Possibly under some circumstances, if a servant receives from a third person a thing for the master, not the master's before; in a case where the receipt is, as to other persons, a receipt in law by the master; a second person, taking the thing by delivery from the first, may commit larceny of it as against the master, into whose possession this second servant cannot deny that the thing has come."

And again at section 836: "If a servant, having an article in his custody, and intending to steal it, does, for the purpose of theft, anything with the article forbidden by his duty, he commits larceny."

The rule as above stated is maintained in its integrity and without modification in the decisions in this state above cited.

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In the case at bar the *possession* of the property taken was in the company. Barringer, a mere employee, to wit, the company's service engineer, had the *care* and *custody* of these prints. His possession was clearly the possession of his master, the company,

The grand jury were well warranted in finding that when the defendant received these prints from Barringer he intended to appropriate them to his own use. They were delivered to him by another servant. His possession acquired under such circumstances was the possession of his master, the company, and when he took the property under such circumstances *animo furandi* and thereafter appropriated them to his own use he committed the crime of larceny as it existed at common law and before the adoption of the Penal Code.

The learned counsel for the defendant urges that the defendant had *access* to these prints at all times, and that he was lawfully in possession thereof. "Access" to the property certainly does not necessarily carry with it *possession.* The clerk in a store has *access* to the clothing on the shelves and to the cash register and to the property which it is his duty to sell, but if he appropriates it with felonious intent it has never been doubted that he commits the crime of larceny at common law. So in the case at bar the defendant's access to these prints does not help him. These prints were in the possession of his master. Such possession as he got for the purpose of stealing them was his master's possession, and when he thereafter in fact carried out his original intent by taking them away and converting them to his own use he committed the crime of larceny at common law.

My conclusions in this matter are summarized as follows:

First. Where the competent evidence before the

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grand jury is insufficient to establish the crime charged, the indictment should be dismissed.

Second. The charge in the second count of the indictment, for criminally receiving stolen property, is not supported by the evidence before the grand jury.

Third. The charge of grand larceny in the first degree contained in the first count cannot be supported by evidence showing the crime to have been committed by what formerly constituted either false pretenses or embezzlement.

Fourth. The evidence appearing before the grand jury is sufficient to sustain a charge of grand larceny at common law.

An order may be entered dismissing the second count in the indictment and denying the motion to dismiss the first count thereof.

Ordered accordingly.

EMELINE A. RONTEY, Plaintiff, *v.* PIERRE A. RONTEY, Defendant.

(Supreme Court, Westchester Special Term, September, 1917.)

Divorce — action for absolute — domicile — evidence — judgments.

Within two years after his marriage to plaintiff in this state, defendant without justification left her and their child and went to another state where in less than two years he obtained a decree of divorce on the ground of her cruelty. Though she was served with process in this state she never entered an appearance in the action and at no time lived in the state where the decree was granted. *Held,* that she was entitled to a decree of absolute divorce on the ground of defendant's misconduct with one whom, after the divorce granted to him, he married in another state, a further marriage ceremony between them being celebrated in this state a few days later.

ACTION for absolute divorce.

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Clarence A. Weill, for plaintiff.

Strang & Taylor, for defendant.

YOUNG, J. Plaintiff and defendant married in New York September 18, 1913. They had one child born July 9, 1914. Defendant left plaintiff December 17, 1914, and went to Maine. He there obtained a decree of divorce from her on May 29, 1916, on the ground of her cruelty. She was served with process in New York, and never appeared in the suit in Maine. At no time has she ever lived in Maine. Defendant returned to New York June 2, 1916; became engaged to marry one Harriet A. Deniton, June 8, 1916; married her in Connecticut, June 21, 1916, and a further marriage ceremony between them was performed in New York a few days later.

These facts are undisputed. In this action plaintiff seeks a divorce on the ground of defendant's misconduct with Harriet A. Deniton. Defendant claims, and plaintiff denies, that their separation in December, 1914, was due to her cruelty which justified him in leaving her.

North v. *North,* 47 Misc. Rep. 180, is relied upon by defendant to support his defense that the Maine decree is a bar to this action. In that case plaintiff abandoned defendant and refused to live with him. He thereafter removed to California and obtained a divorce on the ground of her desertion. She was not personally served in California. It was held that by her abandonment the matrimonial domicile was broken, and that defendant had acquired a new domicile in California, and that the decree there was a bar to her action for support.

Defendant here urges that if plaintiff's conduct justified him in leaving her, the legal effect of her cruelty was equivalent to desertion or abandonment

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on her part, and therefore brought this case within the doctrine laid down in *North* v. *North, supra.*

I cannot find that that doctrine has ever been passed upon by our court of last resort or by the United State Supreme Court. The decision of the Special Term in *North* v. *North* was affirmed by the Appellate Division of this department (111 App. Div. 921), but the appeal to the Court of Appeals was dismissed for failure to file the requisite undertaking. 192 N. Y. 563.

In *Atherton* v. *Atherton,* 181 U. S. 155, which is cited in *North* v. *North,* plaintiff and defendant married in New York, but removed to and lived for some time in Kentucky. Plaintiff then left her husband, claiming to be justified in so doing, and returned to New York. Defendant thereafter, without personal service of process in Kentucky, obtained a decree of divorce against her there on the ground of abandonment. Our Court of Appeals held in an action brought by her for a separation on the ground of cruelty, that she had acquired a new domicile in New York, and that the Kentucky decree was made without jurisdiction of her person, and did not bar her action (155 N. Y. 129). But the United States Supreme Court reversed this judgment, and held that she was bound by the Kentucky decree; that Kentucky was the undoubted domicile of the husband, and the only matrimonial domicile of the husband and wife, and that she was therefore precluded from justifying her abandonment by alleging his cruel treatment.

In *Haddock* v. *Haddock,* 201 U. S. 562, the parties married in New York, and immediately separated. The husband went to Connecticut and obtained a divorce upon constructive service only. The wife continued to reside in New York, and subsequently brought an action for a separation. It was held that Connecticut was never the actual or constructive

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matrimonial domicile, since the husband had deserted the wife in New York, and that the Connecticut decree did not bar her action.

It is established by all these cases that constructive service of process is effective to support a decree only where the defendant is actually or constructively domiciled within the territorial jurisdiction of the court pronouncing such decree. Domicile of the husband alone is insufficient to confer such jurisdiction unless such domicile constructively includes that of the wife as well. *North* v. *North, supra,* can only be reconciled with the decisions of the United States Supreme Court by bringing it within this principle. Applying it to the facts of that case, we have the case of a husband free at all times to seek and acquire such domicile as he deemed convenient and proper. Any new domicile thus acquired became at once the wife's domicile, actual, if she follow and live with him, constructive, if she refuse. Although she had abandoned him, she was at all times at liberty to return to him at any domicile he might have chosen. The new domicile of the husband in California therefore became the domicile of the wife. She was therefore a citizen of California, and as such subject to the provisions of its statutes for substituted service and bound by the decree. This seems to me to be as far as our courts have gone.

But this furnishes no support for defendant's contention in the case at bar. There is no pretense here that when he left plaintiff he intended, or was even willing, that she should follow him to a new matrimonial domicile in Maine. Indeed, his purpose was quite the contrary. How, then, can he successfully maintain that a new matrimonial domicile was acquired, and at the same time refuse to allow her to live there?

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The decisions of the United States Supreme Court establish the principle that a decree rendered by a court of the matrimonial domicile upon constructive service is binding on the defendant therein, but that a decree rendered upon like service by a court of the husband's domicile, acquired after deserting his wife, is without jurisdiction. It does not follow, conversely, that if a husband be justified in separating from his wife he may leave her and acquire a new domicile which will become the constructive domicile of the wife as well, or a new matrimonial domicile. On the contrary, I am of opinion that a matrimonial domicile is the place where the parties live together as husband and wife, either actually or constructively. Such matrimonial domicile continues until a new one is acquired. It cannot be acquired, even constructively, by a separation by one party from the other with the clear and avowed intention to sever matrimonial relations, even though justified.

Under this construction of the decisions of our highest tribunal, it clearly follows that the Maine decree is invalid, and does not bar this action.

Furthermore, I am convinced from the evidence that defendant was not justified in leaving plaintiff, and that his attempt to acquire a new domicile was not made in good faith, but, on the contrary, for the sole purpose of procuring the decree of divorce which he did, and which he could not obtain in this state.

The plaintiff is therefore entitled to a decree of divorce in accordance with this opinion.

Judgment for plaintiff.

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Misc.] Surrogate's Court, Bronx County, June, 1917.

Matter of DOROTHY E. MUNN, WALTER MUNN, JR., and HELEN M. MUNN.

(Surrogate's Court, Bronx County, June, 1917.)*

Guardians — application for appointment of — infants — evidence — paramount right of appointment.

Upon a contested application for the appointment of a guardian of the persons of three infants, respectively, it appeared that the mother of the infants was dead and at the time of her death was not living with her husband, who survived. She and two of her children resided with her sister and the latter's husband and the other child was in the care of and resided with the petitioner, her grandmother. The evidence considered and

Held, (1) That the father has the paramount right to be the guardian of his own children; that this natural right should not be denied him unless it clearly and unequivocally appears that the best interests of the infant demand the appointment of some one else; that in the last analysis the court must be governed by a consideration of what is for the best interests of the children; that it does not appear that the best interests of two of the infants demand that the father should be deprived of his right to the guardianship of their persons, and that the court has authority to appoint some one other than the party for whose appointment the petition prays;

(2) That the appointment of guardians may be coupled with conditions; that the appointment of the respondent as guardian of the persons of the two younger infants is upon the condition that the uncle, aunt and grandmother have access to them at all reasonable times and that the respondent see to it that the children named visit them at least once in each month;

(3) That the best interests of the third infant demand that the grandmother be appointed the guardian of her person upon condition that the grandmother permit the father to see her and converse with her at all reasonable times and that she have the child visit her father at least once in each fortnight.

* Received too late for insertion in proper place.—[REPR.

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APPLICATIONS for the appointment of guardians of the persons of three infants.

Lockhart & Callahan, for petitioner.

Charles V. Halley, Jr., for respondent.

SCHULZ, S. The maternal grandmother of the three infants, Dorothy E. Munn, Walter Munn, Jr., and Helen M. Munn, aged, respectively, five, ten and eleven years, applied for letters of guardianship of their persons, and upon such applications cited the father of the infants. The latter appeared by counsel and in open court opposed the applications and asserted his right to such appointments. The circumstances necessarily to be considered in arriving at a conclusion in each application are practically the same, and hence are discussed and the proceedings disposed of together.

The mother of the infants is dead. At the time of her death she was not living with her husband. She and two of her children were residing with her sister and the latter's husband, and the other child, Helen M. Munn, was in the care of and resided with her grandmother, the petitioner in these proceedings. Pending the hearing and consideration of these matters, Walter Munn, Jr., left his uncle's house and went with his father, and after remaining there for some time has now gone back to his former abode.

The evidence discloses that the conditions surrounding the married life of the respondent and his wife were not happy. Frequent separations occurred and it was necessary for the wife to invoke the aid of the courts to compel her husband to support her. Who was to blame for these unfortunate conditions I will not attempt to say, but it has been clearly established that the father of these infants did not, by his acts

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prior to his wife's death, manifest the love and affection for his children which he now claims to have. The fact remains, however, that they are his children; that he is their nearest living relative, and that, while open to criticism for his past failure to adequately provide for them, he now asserts his right to their custody, declares his willingness and ability to support and maintain them and provide them with a home.

That he has a paramount right to be the guardian of his own children I believe cannot be questioned (Woerner, American Law of Guardianship, § 7), and that a court should be loath to deprive him thereof it seems to me is equally manifest. This natural right should not be denied him unless it clearly and unequivocally appears that the best interests of the infants demand the appointment of some one else. The court must, in the last analysis, be governed by a consideration of what is for the best interests of the children. *People ex rel. Pruyne* v. *Walts,* 122 N. Y. 238; *Ullman* v. *Ullman,* 151 App. Div. 419; *Matter of Annan,* 74 Hun, 19; *Foster* v. *Mott,* 3 Bradf. 409; *Matter of Lee,* 220 N. Y. 532.

The uncle and aunt with whom the two children have resided since the death of their mother are entitled to great credit for the care which they have taken of them; but they have four children of their own, they reside in an apartment of five rooms and, while no doubt they have done everything within their power for the welfare and happiness of the children, they cannot do more than their circumstances will permit. The father lives in the home of his parents who occupy a house, and, while there are also some seven other children constituting the household, I nevertheless believe that the physical comfort of the infants would be greater if they lived with the respondent at the home of his father. I am also of the opinion that it

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would be better for the two younger children, particularly the boy, if they lived with their father and were subject to the discipline of parental control, and I therefore reach the conclusion that it does not appear that the best interests of the two children, Dorothy E. Munn and Walter Munn, Jr., demand that the father should be deprived of his right to the guardianship of their persons. It follows that the applications of the grandmother for appointment as guardian of the persons of the infants named must be denied.

As I have the authority to appoint some one other than the person for whose appointment the petition prays (Code Civ. Pro. § 2649; *Ledwith* v. *Ledwith*, 1 Dem. 154; *Matter of Wyckoff*, 67 Misc. Rep. 1; *Estate of Vandewater*, 27 Wkly. Dig. 314; appeal dismissed, 115 N. Y. 669), I will appoint the respondent, the father, such guardian.

The kindness of the uncle, the aunt and the grandmother of these children and the interest which they have manifested in their welfare, and which I hope will continue for their benefit, would seem to dictate that the father when appointed guardian should permit these children to visit the relatives named and remain in touch with them. It seems that appointment of guardians may be coupled with conditions (*Matter of Wagner*, 75 Misc. Rep. 419; *Matter of Cross*, 92 id. 89; affd. without opinion, 174 App. Div. 872), and so the appointment of the respondent as guardian of the persons of these two infants is upon the condition that these relatives have access to the infants at all reasonable times and that the respondent see to it that the children named visit them at least once in each month.

I have refrained from discussing up to this time the application relative to the infant Helen M. Munn. The conditions with reference to this infant are some-

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what different from those of the other two. She has been with her grandmother since her birth. For a considerable time she was practically an invalid and her physical condition at this time is not of the best. She suffers from rheumatism to a great extent, and a very close bond of affection exists between her and her grandmother. In my opinion it would be cruel and inhuman to take this child away from her grandmother at this time. I believe that her best interests demand that she remain where she is. Upon the arguments before me the respondent practically expressed his willingness that she remain with the grandmother. Under such circumstances, it was intimated that the grandmother should support and maintain her. I will not impose that condition nor relieve the respondent from his legal responsibility therefor.

The application for the appointment of the grandmother as guardian of the person of Helen M. Munn is granted. The only condition attached to that appointment will be that the grandmother permit the father of this child to see her and converse with her at all reasonable times and that she have the child visit her father at least once in each fortnight.

Decreed accordingly.

Matter of the Application of ANNA R. MAHNKEN, as Administratrix of the Estate of HENRY MAHNKEN, Deceased.

(Surrogate's Court, Bronx County, September, 1917.)

Decedents' estates — executors and administrators — application for order granting leave to enter into possession of real property denied — motions and orders — Code Civ. Pro. § 2701.

An *ex parte* application, under section 2701 of the Code of Civil Procedure, for an order granting an administratrix leave to enter into possession of real property of which decedent

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died seized, denied upon the ground that the petition did not state facts sufficient to justify the granting of the order. Where facts are such as to justify an application under said section, the relief asked for cannot be granted without the issuance of a citation.

APPLICATION for an order granting leave to an administratrix to enter into the possession of real property of which a decedent died seized.

Spitz & Bromberger, for petitioner.

SCHULZ, S. This is an *ex parte* application for an order granting leave to an administratrix to enter into the possession of the real property of which a decedent died seized. The reason the order is desired is stated to be that a tenant in one of the parcels of such real property refuses to pay the rent therefor unless such order is made.

I can find no authority sanctioning the making of such an order upon the facts alleged. Section 2701 of the Code of Civil Procedure which counsel has drawn to my attention does not cover the matter. That section provides that application for the relief mentioned may be made and that if from the petition "it shall appear that a mortgage, lease or sale of such real property will be necessary unless the purposes specified in section 2703 of this title be otherwise fulfilled, a citation shall issue * * *."

The petition in this matter alleges that no "mortgage, lease or sale of such real property hereinbefore set forth or any part thereof will be necessary at this time."

It is evident that the provisions of the section in question were intended to obviate the necessity of a sale and perhaps a sacrifice of real estate for the purposes stated in section 2703 of the Code of Civil Procedure, when the same could be prevented by empower-

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ing the personal representative to collect the rents and apply them to the payment thereof. See note to this section in the Report of the Revision Commission, February 9, 1914; Jessup & Redfield Surr. Pr. § 967.

It will further be noted that even where the facts are such as to justify an application under section 2701 of the Code the relief cannot be granted without the issuance of a citation to the known persons within the state of New York who have the legal title to such real estate by descent or devise to show cause why the prayer of the petition should not be granted. The application must therefore be denied.

Application denied.

Matter of the Estate of THADDEUS LOCKWOOD, Deceased.

(Surrogate's Court, Rockland County, September, 1917.)

Wills — provisions of — legacy — power of sale — dower — election — evidence — Real Property Law, § 200.

Where a testator, who at his death was the owner of real property worth $2,000 and some household furniture of but little value, bequeathed to his wife all of his personal estate, an additional legacy to her of $1,000, if accepted, is an implied charge on real estate passing under the residuary clause, though the will does not expressly charge the real estate with the payment of the legacy.

The will, which contained no power of sale, was executed more than four years prior to testator's death and his wife died more than five years later and during the whole of the intervening period and until her death she occupied the real property and had possession of her husband's will, which was admitted to probate more than seven months after her death. No portion of the real estate was assigned to her for dower, she brought no action therefor, neither was her time to make her election between the legacy and dower enlarged or extended, nor was there any evidence on her part of a willingness or of an intention either to accept or decline the legacy. *Held*, that having failed to make an election as required by

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section 200 of the Real Property Law she must be deemed to have accepted the legacy in lieu of dower, and that her personal representative has a valid claim therefor against the husband's estate.

PROCEEDINGS for determination by this court of the question as to whether the testator's widow, during her lifetime, had elected to take her dower in his real property, and to waive a legacy or pecuniary provision given to her in lieu thereof.

Sykes, McCole & Potter, for petitioner.

John F. Bargfrede, for widow's administrator.

MCCAULEY, S. The decedent, Thaddeus Lockwood, died December 18, 1909, leaving a last will and testament dated September 9, 1905, and which was admitted to probate by this court January 15, 1917.

The will in its opening clause directs that the testator's just debts and funeral expenses shall be paid as soon as convenient after his death. The second and third clauses, which are before us for consideration, are as follows:

"II. I give and bequeath to my wife the sum of one thousand ($1,000) dollars; and all my personal property, and I expressly declare that this gift to my wife, if accepted by her, shall be taken in lieu of dower.

"III. All the rest, residue and remainder of my property I give, devise and bequeath to my sister Lizzie Jane Dann, and my nieces Matie Grindle and Minnie Grindle, share and share alike, and to their heirs, executors, administrators and assigns forever."

The executor named in the will failed to qualify, and thereupon letters of administration, c. t. a., were granted to Matie E. Grindle, one of the residuary legatees, February 13, 1917.

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The testator's wife, Emilie C. Lockwood, survived him, but died intestate May 1, 1916, and letters of administration upon her estate were granted by this court to George W. Sherman, who qualified and is now acting as such administrator.

The legacy of $1,000 has not been paid and this proceeding was initiated by the administratrix, c. t. a., for the purpose of obtaining an adjudication by this court upon the question whether the widow had elected, during her lifetime, to take her dower in the testator's real property and had thereby waived the legacy or testamentary provision in her favor.

The administrator of the widow's estate insists that she made no election, express or implied, and must be deemed to have accepted the pecuniary provision; and, therefore, that the bequest is a valid claim in favor of her estate.

The testator's real property consisted of a house and lot known as the homestead, valued at $2,000, or thereabouts, situated at Spring Valley, in this county, wherein he and his wife resided at the time of his death; and his personal property at the time of his death consisted of certain articles of household furniture, of little value, which have been delivered to the administrator of the widow's estate. I think the evidence before me justifies the inference that the testator had no other personal property at the time of the execution of his will, or subsequently.

There was no personal property out of which the legacy could be paid, and its payment, therefore, depended upon the question whether or not it was a charge upon the real property.

The fact was proven upon the hearing, and not disputed, that the widow continued to occupy the homestead, with its furniture, until her death. It also appeared that on January 10, 1910, she had possession

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of her husband's will, that it remained in her possession until she died, that she knew its contents, and took no proceeding for its probate.

The will was found in the dwelling amongst the testator's personal effects after the widow's death, and was then offered for probate by one of the residuary legatees.

The case presents two questions for our consideration, namely, (1) was the legacy, or pecuniary provision in favor of the widow, if accepted, a charge upon the real property; and (2) was there an election on the part of the widow, either express or implied, to accept the legacy or pecuniary provision, and a consequent waiver of her right of dower in the real property?

We think the first question must be answered in the affirmative. The will contains no power of sale, nor does it in express terms charge the payment of the legacy upon the real property, but we think there is an implied charge.

The testator's words are, "I give and bequeath to my wife the sum of one thousand ($1,000) dollars, and all my personal property," etc. In the residuary clause, which immediately follows the bequest to the wife, "all the rest, residue and remainder of my property" is given in equal shares to the three residuary legatees. The gift to his wife was of all his personal estate and an additional legacy of $1,000.

Having given to his wife all of his personal property, the testator knew that the legacy, if accepted, must be paid out of his real property. There was no other property out of which it could be paid. The residuary legatees were given only what remained of the estate after the debts, funeral expenses and legacy were paid.

The rule that legacies may be charged upon real

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property without express direction in the will, if the intention of the testator so to do can be fairly gathered from the provisions of the will, has received the sanction of our courts in various cases. It is always a question of intention, and while the language of the will is primarily the basis of the inquiry, yet where the language is ambiguous, uncertain or doubtful in its meaning, extrinsic facts and circumstances which aid in the interpretation of the language employed, and help to disclose the actual intention, may be considered. *Matter of Knapp,* 91 Misc. Rep. 391, and cases there cited, particularly *Ely* v. *Ely,* 163 App. Div. 320; *Hoyt* v. *Hoyt,* 85 N. Y. 142; *McCorn* v. *McCorn,* 100 id. 511; *Briggs* v. *Carroll,* 117 id. 288; *Irwin* v. *Teller,* 188 id. 25.

In *Ely* v. *Ely, supra,* which was an action for the construction of a will involving a similar situation, the court, at page 331, says: "I am of the opinion that the testator intended that the legacies provided by him should be paid; that he knew that the amount of his personal property was insufficient in and of itself to satisfy all the legacies; that he, therefore, intended that they should be charged upon his real estate, and that the will should be so construed."

In *Hoyt* v. *Hoyt, supra,* wherein it was sought to charge the payment of legacies upon real estate, the court said: "There is no express direction in this will that these legacies be charged upon the real estate. Yet legacies may be charged upon real estate without express direction in the will, if the intention of the testator so to do can be fairly gathered from all the provisions of the will; and extraneous circumstances may be considered in aid of the terms of the will. The will in this case is lean of the clauses and expressions that have been mainly rested upon in the earlier adjudications of this State as showing that intention.

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It does not direct the legacies to 'be first paid,' and then devise the real estate; it does not devise the real estate, nor the remainder of the real and personal estate, 'after the payment of the legacies;' it does not devise the real estate to a person in his own right, or as executor, and expressly direct him to pay the legacies. It does not make a residuary devise of 'all not herein otherwise disposed of.' These several forms of expression have been held to indicate an intention in the testator to charge the payment of the legacies upon the real estate devised. None of them are here. * * * It is assumed that no man, in making a final disposition of his estate, will make a legacy, save with the honest, sober-minded intention that it shall be paid. Hence, when from the provisions of a will prior to the gift of legacies it is seen that the testator must have known that he had already so far disposed of his personal estate as that there would not be enough left to pay the legacies, it is reasoned that the bare fact of giving a legacy indicates an intention that it shall be met from real estate. So it was reasoned in *Goddard* v. *Pomeroy* (36 Barb. 546–556)."

In *McCorn* v. *McCorn, supra,* which was a similar action, Judge Finch writing the opinion said: "Whether a legacy is charged upon the real estate of the decedent is always a question of the testator's intention. The language of the will is the basis of the inquiry, but extrinsic circumstances which aid in the interpretation of that language, and help to disclose the actual intention, may also be considered. * * * His personal estate was insufficient even to pay his funeral expenses, and the two legacies to the widow and son were mere mockeries unless meant to be a charge upon the real estate. The testator must have known that he had no personal estate with

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which to pay the smallest portion of his bequests, and unless he meant to charge them upon the land we must impute to him the deliberate and conscious intention of making bequests to his wife and son which he knew could never be paid. * * * the situation is such that all possibility of innocent mistake is removed, and the facts drive us to the alternative of believing that the testator in making his last will, under the solemnity of approaching death, indulged in bequests known to be useless and vain, or meant they should be paid from the only possible source. No reasonable intelligence can hesitate to draw the latter inference."

In *Briggs* v. *Carroll, supra,* the testator gave to his wife a legacy of $2,500 to be accepted by her in lieu of dower; to his son C. $1,500, to be used for his education; and $500 to the plaintiff, his grandson. He gave his residuary estate to his four children. At the time of the execution of his will the testator's personal estate did not exceed $1,500 in value, of which amount he subsequently used $700 in the purchase of certain real property, and his personalty was still further depleted, as a source for the payment of legacies, before his death. In an action to have the plaintiff's legacy of $500 made a charge upon the testator's real property, in the hands of the residuary devisees, the court, at page 292, said: "The testator must have realized the situation. He could not have been deceived or mistaken; and so we are shut up between two alternatives. Either he intended to sacrifice the comfort and welfare of his wife and son Charles for the benefit of his older and married children, and deliberately continued to make their situation worse by putting personal estate into land and incurring debts, or he supposed that their legacies would rest upon his real estate. I think we are justi-

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fied in holding that the latter was his understanding of the will."

In *Irwin* v. *Teller, supra,* the trial court found that the testator left no personal property out of which certain pecuniary legacies could be paid, and the court on appeal (188 N. Y. 25) said: "Starting out with these findings, the conclusion follows under the settled law of this state that these legacies are a charge upon the real estate of the plaintiffs devised to them by the testator."

In *Richardson* v. *Richardson,* 145 App. Div. 540, the court said: "The testator knew when he executed his will that his personal property was insufficient to pay even the amount he had determined his executors should receive for their services, and it is not to be presumed that he intended to prefer the corporations to the exclusion of his own kindred, and it is noticeable that he disposed of both his real and personal property as a whole without making any distinction between real and personal property. I think that it was the intent of the testator that his real and personal estate together were to furnish the fund out of which the legacies were to be paid." See, also, *Hogan* v. *Kavanaugh,* 138 N. Y. 417; *McManus* v. *McManus,* 179 id. 338.

The will now before us was executed more than four years prior to the testator's death. His wife's death occurred more than five years after his decease, and during that period, as above stated, she occupied his real property, had possession of his will, and was cognizant of its provisions. The will was probated more than seven months after the widow's death.

It does not appear that the widow paid the taxes, or made any expenditures for repairs upon the property. There is no evidence of any act on her part evincing a willingness or intention, either to accept

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or decline the pecuniary provision. She simply remained in possession of the property until her death without exercising her right of election.

The evidence shows that the residuary legatee, upon whose petition the will was probated, saw the will in the widow's possession at the time of the testator's death, and thereafter, and that she was familiar with all of its provisions during the period of the widow's occupancy of the property. It also appears that one, if not both, of the other residuary legatees possessed the same information; and it is conceded that none of the residuary legatees ever called upon the widow to exercise her election, or made any objection to her occupation of the property.

The petitioner claims that there was an implied election on the part of the widow to take her dower in the real property, and to waive the legacy, arising out of the fact that she remained in possession of the property, and took no steps to probate the will.

The Real Property Law (Laws of 1909, chap. 52, § 200) provides that "If real property is devised to a woman, or a pecuniary or other provision is made for her by will in lieu of her dower, she must make her election whether she will take the property so devised, or the provision so made, or be endowed of the lands of her husband; but she is not entitled to both." Section 201 of the same statute provides that where a woman is entitled to an election, as prescribed in the preceding section, "she is deemed to have elected to take the jointure, devise or pecuniary provision, unless within one year after the death of her husband she enters upon the lands assigned to her for her dower, or commences an action for her dower." For the history of these provisions, see R. S., pt. 2, chap. 1, tit. 3, § 13, as amd. by Laws of 1895, chaps. 171, 1022, and Laws of 1896, chap. 547, § 180.

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It is conceded that no portion of the real property was assigned to the widow for her dower, that she commenced no action for her dower, and that her time to make her election was not enlarged or extended, as provided by the statute, or otherwise. We think the statute was intended to require some act on the part of the widow which evinces a clear and unequivocal intention to make her election.

In *Matter of Nagel*, 12 N. Y. Supp. 707, the testator by his will devised to his wife one-third of the rents, use and income of his real estate, and also gave her a bequest of $100, providing explicitly that the devise and bequest should be in lieu of dower. Nearly three years after his death his widow, who had then remarried, made and caused to be filed in a proceeding for the sale of the testator's real property to pay debts a paper in which she in form renounced her right to the devise and bequest, intending thereby to take her portion as widow in the proceeds of the sale. The real estate consisted of a hotel, and the proofs showed that the widow continued to occupy the property, and to manage and operate the hotel, for two or three years after her husband's death, the same as he had done during his lifetime. The court, in passing upon the question of the widow's right to make her election at that time, says: "Her election was made too late. The statute requires her to come to this decision within a year after the death of her husband, and in case of her failure so to do 'she shall be deemed to have elected' to take under the will (Rev. St. pt. 2, c. 1, tit. 3, secs. 13, 14; *Palmer* v. *Voorhis*, 35 Barb. 179; 4 Pom. Eq. Jur. sec. 496). And her ignorance of the condition of her husband's estate, or of the fact that the testamentary provision is disproportionate to the value of her dower, does not relieve her from the effect of this statute." Citing

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Akin v. *Kellogg,* 119 N. Y. 441; *Lewis* v. *Smith,* 9 id. 502–511, and other cases.

The court in discussing the question as to whether or not the widow had in fact made an election to take her dower, by continuing in the possession and management of the property, further says: "Counsel claims this was 'an entry on the lands to be assigned to her for her dower;' thus making an election, within the statute. I do not think her conduct has any such significance. She had minor children, and with them continued in the occupation of all the property left by her husband. There was no specific setting apart of any of it in her occupation. She held the land in common with the children, making a home for them all, the same as before her husband's death. Her occupation was the same as that of nearly every family of a decedent. A farmer dies, leaving a bequest to his widow in lieu of dower. In by far the greater majority of cases she and her children will continue to occupy and carry on the farm on the lines marked out by the decedent. But this cannot constitute 'an entry on the lands to be assigned to her for her dower.' *That means a positive, unequivocal act announcing her determination to make an election.* The presumption is that she will accept the provisions of the will rather than her dower. O'Hara Wills, 246. And she must overcome this presumption by the positive act of election provided for in the statute."

In *Akin* v. *Kellogg, supra,* the testator by his will gave to his widow, in lieu of dower, one-third of his personalty, and the net income for life of one-third of his real estate, which was vested in a trustee for that purpose. About three years after her husband's death the widow brought an action in which she asked that she be permitted to make her election, renounce

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the testamentary provision and have her dower assigned on the ground that she was ignorant of the extent of her husband's estate until the executor filed his accounts, and was induced to omit to take the steps necessary to claim dower by representations of the executor, in the presence of the principal beneficiary under the will, as to the value of her dower right. It was held that she was not entitled to the relief sought, and the court in its opinion said, at page 447: "Here the complainant was apprized by the will of an option offered to her with reference to her future property rights, and it became at once her legal duty to be diligent and careful in acting, if she proposed to take what the law assured to her, in place of what the will gave. The Revised Statutes have but followed the common law, in their provision for an election by the widow between a testamentary gift in lieu of dower and the dower right itself; but they have further provided that the widow shall be deemed to have elected her devise, or pecuniary provision, unless, within one year after the death of her husband, she shall enter upon the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof. Where, then, a provision is, by the express terms of the will, made in lieu of dower, the widow is obliged to make an election, whether to accept it, or to renounce it for what the law gives to her. She cannot have both, and she is at once chargeable with the duty of informing herself, so as to make her election; and that she shall have a certain period of time for that purpose, the legislature has provided what was deemed a reasonable season of delay, and its enactment that the election must be made within one year has the same force as a statute of limitation upon the widow's rights. The object of the legislature was to compel the widow to

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make her election a reasonable time after the death of her husband. (*Hawley* v. *James*, 5 Paige, 446.)"

In *Flynn* v. *McDermott*, 102 App. Div. 56, the testator's widow was given a legacy in lieu of dower, but died within a year after her husband's death, during the pendency of an action brought by her to have the will declared invalid and the probate revoked, without having made her election. It was held that the death of the widow within the year did not deprive her of the legacy, and that her executor was entitled to maintain an action to recover it. The court on pages 58, 59, says: "The defense is that the right to the legacy depends upon an election to be made by the widow to accept it in lieu of dower; that such right of election is purely personal to her, and she having died without making it, her estate cannot elect for her or recover the legacy, and that by her death the consideration she was to pay the estate for the legacy, namely, her dower interest, has ceased to exist. The defendant cites several cases which he claims are authority for his position, but this case seems to turn upon the proper construction of section 181 of the Real Property Law (Laws of 1896, chap. 547).

"It is clear that the testator deemed the legacy to his wife a suitable and proper provision for her considering her station in life, his property and the other persons dependent upon his charity or bounty. But he did not mean that she should have the legacy and her dower too. The will fixes the limit of what the testator desired her to receive. But if she were not satisfied with it she could renounce it and take her dower. It is too technical a view to treat the provisions of the will as an offer made by the husband to her and that she personally must accept this offer and thus close the contract, and that having died

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within the year which would bar her election, that she thereby forfeits the provisions which her husband intended for her. The widow is treated as the favorite legatee, the one nearest to the testator, the person for whose welfare he is most solicitous, and she is entitled to a liberal and not a technical or restricted construction of the statute. She is not deprived of the benefits under the will because she did not survive her husband the year and thus become barred from recovering her dower. The legacy was given her without regard to the probable duration of her life and without any condition whatever, except that it was the limit of what she was to receive from the estate. This case is covered by the provisions of the statute which puts the widow in the position of a presumed acceptance of the legacy, assuming that the husband has provided for her more liberally than the law itself would do. And whether the lapse of the year, or her death within the year, prevents her rejecting the benefits of the will, the fact remains that she did not enter upon the lands assigned to her for her dower or take any proceedings to recover her dower during the year, and the statute declares that the legacy is hers unless she does one of those acts."

This case was affirmed by the Court of Appeals (183 N. Y. 62), and that court said: "The widow is given one year from her husband's death in which to make an election between the legacy given in lieu of dower and the enforcement of the dower right. The position taken by the appellant is that as the right of election is personal, and the widow having died without exercising it, she must be deemed to have abandoned her right to the legacy.

"It has been held that a bequest in lieu of dower, and the acceptance of same, amounts to a matter of contract and purchase; that the wife is to be paid

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the bequest in preference to other legacies and without abatement, the debts being first paid. (*Isenhart* v. *Brown*, 1 Edwards' Ch. 411; *Hathaway* v. *Hathaway*, 37 Hun 266.)

"The appellant argues, from this undoubted principle of law, that a legacy left in lieu of dower differs from an ordinary legacy and is purely personal to the widow, as it is coupled with the statutory right of election vested in her, and the latter failing by reason of her death, the legacy falls with it. This construction is unreasonable and unwarranted. The effect of the widow's death within the year is to vest the right to collect the legacy in her executor."

In my opinion the widow failed to make an election, as the statute requires, and must therefore be deemed to have accepted the legacy in lieu of her dower, and her personal representative has a valid claim against the decedent's estate therefor.

Decreed accordingly.

Matter of the Construction of the Last Will and Testament of ALICE HALL BRIGGS, Deceased.

(Surrogate's Court, Saratoga County, September, 1917.)

Wills — directions contained in — construction of — power of disposition — trusts — aggression — Real Property Law, § 153.

Where the clause of the will of testatrix, by which she gave the rest of her property to trustees for the purpose of investment, management and payment of the net income to her husband for life, directs that during his lifetime he use as much of the principal of the estate "as in his judgment is necessary and proper and that he in no way be held liable or accountable for such principal so used," and it appears from a reading of the whole will that the estates given to other legatees were all intended to be subordinate to the authority conferred

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upon her husband and that the provisions for other legatees and remaindermen were intended to provide for a possible or probable remainder rather than a certain one, it will be held that under section 153 of the Real Property Law which provides that: "Every power of disposition by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit, is deemed absolute," the husband who has already taken a portion of the principal under a claim of right to all of it has an absolute power of disposition; and that while not liable for any property used within the wide limits of his authority he must be held accountable for any aggression beyond that.

PROCEEDING for construction of a will.

John L. Henning, for Edward D. Eddy, petitioner.

Edgar T. Brackett, for J. Lynde Briggs.

Slade, Harrington & Goldsmith, for Hudson River Humane Society and Young Men's Christian Association.

Corliss Sheldon, special guardian for Mary Louise Edwards.

Butler, Kilmer & Corbin, for Saratoga Hospital et al.

George S. Van Schaick for Louise E. Parsons.

Harold C. Beatty, for John Franklin Durston et al.

H. P. Pendrick, for First Baptist Church.

John A. Slade, special guardian for Frederick Hurlbut.

OSTRANDER, S. Petitioner prays judicial construction of the will and codicil of Alice Hall Briggs,

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deceased. The will is dated December 18, 1911, and the codicil June 7, 1915. Testatrix died November 25, 1916.

The will directs payment of debts, provides for care of her cemetery lot, leaves to her mother, if she survive testatrix, the life use of her homestead with its furnishings, and gives the fee to her husband at her death, or in case her mother does not survive her.

By the 4th clause she gave the rest of her property to trustees to keep invested and pay the net income to her mother quarterly during her life, and upon the mother's death to pay the net income thereof to her husband quarterly during his life. Said 4th clause further provided: "I further direct that he (her husband) use during his lifetime as much of the principal of my said estate as in his judgment is necessary and proper and that he in no way be held liable or accountable for such principal so used."

By the 5th clause she directed that on the death of her mother and husband, if either survived her, or on her own death if neither so survived, the remaining principal be disposed of as follows: $5,000 each to various cousins, and, in the event of their prior decease, to their issue *per stirpes;* $18,500 to various religious and charitable uses, and the remainder to be divided into six equal parts which were to be paid over to certain of her collateral relatives.

The 6th clause related to realty which by a codicil she gave to her husband, and this clause became inoperative.

The 7th clause empowered her executors and trustees to hold and change investments as directed.

The 8th clause appointed her husband, John Lynde Briggs, and Edward D. Eddy executors and trustees, and provided that each should be liable for his own acts, but not for the acts of his co-executor, and

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directed that neither executor nor trustee should be liable, except for gross negligence.

Her mother having died prior to June 7, 1915, a codicil executed on that day gave all her realty to her husband, and in other respects ratified the will.

The realty devised to the husband was worth about $25,000, the personalty a little over $143,000, the income from her personalty about $6,000. Decedent's debts were about $1,300. The whole estate was subject to payment of several thousand dollars for state and federal tax and expenses of administration.

Acting under the provision of the 4th clause: "I further direct that he use during his lifetime as much of the principal of my said estate as in his judgment is necessary and proper and that he in no way be held liable or accountable for such principal so used," John Lynde Briggs, the husband, has withdrawn $6,000 from the principal of the personal estate, claims a right to withdraw it all and claims to own the fee of the whole estate which he threatens to withdraw and expend for his own personal use.

Mr. Eddy, his co-executor and trustee, seeks a construction of the will and asks the court to determine, *first,* whether the husband is entitled absolutely to the whole estate not disposed of by the 1st, 2d and 3d clauses of the will; *second,* if he be not so entitled, whether the use of principal by him is limited to the amount necessary and suitable for his support and maintenance or limited in any other way; and, *third,* if so limited, whether he must first exhaust his own property before drawing upon the principal for such use.

The pleadings raise issues upon these questions and also upon the jurisdiction of the court to entertain the petition at this time.

It is urged that if the court has any jurisdiction in

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the matter it is limited by the ordinary and usual rules of equity, as applied in the courts of equity, and that the question now presented is academic and not to be entertained.

It appearing that the husband has already taken $6,000 of the principal, claims the right to all of it, and threatens to exhaust it for his personal use, a substantial question is presented and the petitioner is entitled, under section 2510 of the Code, to a construction of the will to guide his action in the premises.

A question which involves the management of the whole estate and the rights conferred by the will is not academic.

Briefly stated, Mr. Briggs' claim to the fee of the whole principal is founded upon the doctrine that the gift over to the cousins, charities and residuary legatees is determinable at his will, is repugnant to the gift to him, is therefore void in its inception and that the whole fee is vested in him. In support of this claim he relies upon section 153 of the Real Property Law, which provides that: "Every power of disposition by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit, is deemed absolute."

This contention to some extent confuses or overlooks the distinction between an absolute *estate* and an absolute *power of disposition.*

Under the common law, as stated in *Van Horn* v. *Campbell,* 100 N. Y. 287, an executory devise, determinable at the will of the first taker, was invalid because the gift is repugnant to the prior estate. Under that rule the expectant estate or gift over was invalid at its inception.

That rule has been changed by statute, and section 57 of the Real Property Law provides that while an expectant estate may be defeated by any act or means

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which the creator in the creation thereof has authorized, yet such expectant estate so liable to defeat shall not be void in its creation.

Contrary to the rule of the common law, the expectant estate is now valid until defeated by the means provided.

Under section 50 of the Real Property Law, a remainder may be limited on a fee, upon the contingency of non-exercise of a power of disposition.

Under the language of the 4th clause of the will, there was no direct gift, in terms, of the property mentioned therein to Mr. Briggs, either for life, for years, or in fee. The gift of the *title* was to the trustees, subject, however, to the power of Mr. Briggs during his lifetime to use so much of the principal as in his judgment should be necessary and proper.

Sections 149, 150 and 151 of the Real Property Law prescribe conditions under which a lesser estate, or an absolute power of disposition, is deemed to be changed into a fee or is tantamount to a fee. None of these sections apply in the case at bar.

An absolute power of disposition may give its holder dominion over property, which, if exercised, will be equivalent to a fee.

This brings us to the question whether Briggs is given an *absolute* power of disposition. In the absence of any statutory provision, an absolute power of disposition would be one by which the holder of the power might dispose of the property as fully and in the same manner as he might dispose of his own individual estate acquired by his own efforts. This would include the power to dispose of it by will, the power to dispose of it foolishly for his own whim or caprice, to squander it, to give it away, or make any disposition that he chose, not infringing upon the rights of his creditors.

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It was held in *Matter of Cager*, 111 N. Y. 343, that a person not having a power to dispose of property by will did not have an absolute power of disposal. A person accountable for his act in any way to any other person does not have a complete and absolute power of disposition in the common understanding of the term. The statute has long provided a definition of an absolute power of disposition. Thus the Revised Statutes provided that "Every power of disposition shall be deemed absolute by means of which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit."

Section 153 of the Real Property Law has re-enacted this provision of the Revised Statutes with a slight change in the arrangement of the words.

Briggs claims that the provisions of the 4th clause bring this case exactly within the provisions of section 153 and that therefore he has an absolute estate in all the property to which section 4 relates, and that the gift over to the remaindermen is void in its inception.

To this I cannot agree. There is a wide distinction between a title in fee and a power of disposition of property. In the latter case the fee is not in the donee of the power, but such donee has a dominion over the fee which he may exercise or not at his option. If he fails to exercise this dominion, then the title to the fee is not changed and never rests in him.

The case of Briggs is of the latter kind. He is given certain rights to dispose of the personal property during his lifetime, and if he exercises that authority in the manner and to the extent in which it is conferred upon him and for the purposes authorized, he may, in his lifetime, dispose of the entire estate and thereby defeat the expectant estates.

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Is the power of disposition in Briggs for his own benefit absolute or limited?

"Whether a power of sale is *absolute* within these statutory provisions is not to be determined by an inquiry as to whether if it be exercised good title passes, but by considering who take or are interested in the proceeds of the sale." *Stafford* v. *Washburn*, 208 N. Y. 536, affg. 145 App. Div. 784.

Under section 153 the tests of an absolute power of disposition are three: Is the grantee (a) enabled to dispose of the entire fee (b) in his lifetime (c) for his own benefit? If so, he has absolute power of disposition.

It is insisted that Briggs, as an individual, has no power of disposition, but that the estate was given to himself and his co-trustee, as trustees, and that the power of disposition which is given to him is given to him as trustee and not as an individual. To this view I cannot assent. The estate was given to the trustees for the purpose of investment, management and payment of the income to Briggs until it be used by him, but this gift to the trustees is subject to the authority given to Briggs to dispose of the principal in accordance with the direction given. The gift to the trustees is upon the condition that Briggs may use the principal, and when he does so and disposes of it then management by the trustees ceases.

There is no apparent intention to vest in him the right to use principal as trustee for the benefit of himself, but the intention is that what he uses shall thereupon cease to be any part of the trust fund, and that in using it he uses it as an individual and not as a trustee.

It is further urged that the use which Briggs may make of this principal is merely in the nature of a

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life use, without power of consumption in the use, or power of alienation of the principal.

To this I cannot assent. The word "use" was intended to mean something more than to receive and dispose of the income. The testatrix had already directed payment of the income of all this estate to Briggs, and by this clause she confers authority over the principal, directing that he may use certain of the principal. It the word "use" was not intended to mean "consume" the language would be idle, since he already had the income. The language of the power conferred upon Briggs is: "I further direct that he (a) use (b) during his life (c) as much of the principal of my estate as in his judgment is necessary and proper, and that he in no way be held liable or accountable for such principal so used."

It will be seen by this language that at least two of the tests of absolute power of disposition, under section 153, are conferred upon him. He is enabled, in his lifetime and for his own benefit, to dispose of something.

Is he enabled to dispose of the entire fee?

He is directed to dispose of so much of the principal as *in his judgment* is necessary and proper. It is urged that this language was intended to limit his use to provision for necessities for his support and maintenance during life, and that his use of it must be necessary and proper having reference to the interests of the expectant estates.

The rule of construction is well settled that the testator's intent must be discovered from all the language of the will, and be given force, so far as it is not positively against the provisions of the statute, or well-settled policy of the law.

What did she mean by the language used?

It is argued that because the testatrix knew that

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her husband, beyond middle life, childless and not in active business, would have about $25,000 in his absolute ownership, and the income from perhaps $125,000 more, that therefore she thought he would have enough with that, and did not intend that he should use any principal except for his support and maintenance.

One answer is that if she thought so she might easily have said so. But she did not say so, and if she entertained such thought she never in terms expressed it in the will.

It is not for a court to constitute itself almoner and attempt to declare what the decedent should have thought, but it must subordinate itself to the testatrix's intent. She refrained from defining and limiting precisely the purposes for which her husband might consume the principal, and the court may not usurp her province by inserting language which it thinks she should have used. The only boundary which she set to his consumption of the principal was that it must be, in his judgment, necessary and proper. She did not say that his use must be actually necessary and proper in the opinion of the court. If she had done so more uncertainty might have resulted than follows the expression which she used, and her husband might have suffered while the courts debated the question of necessity and propriety. If she wanted this, she would have said so. Whether or not she succeeded in avoiding this trouble may be open to question, but she intended to do so. Mr. Briggs may conclude that fine cars, more servants, more luxuries, are necessary and proper for him with his advancing age. A court might not hold this view. She intended to leave decision of such matter to him. Many other uses to which he might desire to put the principal and about the necessity of which courts would differ

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may well be within his power. She did not say for what the use must be necessary and proper except that the use should commend itself to *his* judgment of necessity and propriety — not to the judgment of some one else, whether exercised individually, privately or collectively, and upon the woolsack. She may have thought that though the king and the court can do no wrong, yet nevertheless they sometimes do what it is said they cannot do. At any rate, the standard of necessity and propriety which she decided to fix was the judgment of her "beloved husband," whom she knew, rather than that of some other person, agency or tribunal which she did not know.

This necessity and propriety had reference to the expenditure of her principal as between himself and her heirs and legatees. She probably did not expect him to forget that some of them were of her own blood, though remote, nor the degree of interest in her which they had previously manifested in her lifetime, nor that he himself was the closest of all persons in the world to her. She expected him to consider his own comfort and desires quite as much as those of the remaindermen. She knew from years of companionship with him the workings of his mind, and may have left to his execution, under this power, personal wishes which she did not care to disclose and so confided to his judgment the settlement of necessities and proprieties of the expenditure of this money. She intended it to be his personal judgment, and not the judgment of some other person or tribunal and she so expressed her thought. She gave him a wide latitude, but she had a right to make this latitude as wide as she chose. Within their province, and subject to the husband's power of disposition, she also gave broad power to the trustees.

It is suggested that if she desired to give all to

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him, absolutely, she could have said so. It is equally true that she had an equal right to leave the use of the principal to his own sense of propriety and necessity.

Having clothed him with such power, she then provided that for any principal so spent, that is, in a manner which his honest judgment should call necessary and proper, he should in no way be held accountable or liable. She did not say that he must insure the wisdom of his judgment, but that he must use *his* judgment, be the same more or less, and she did not leave that to be reviewed by any person so long as he exercised an honest judgment in the matter. She did not intend that he should fraudulently omit to use any judgment, nor act in bad faith.

The court may review the question of good faith as a matter of fact. *Matter of Wilkin*, 183 N. Y. 104. Nor did she intend that he should be liable for an honest error in judgment.

The husband may not determine that he will throw the principal away, nor that he will defeat the whole scheme of this will by refusing to entertain any judgment about it, and dispose of it by throwing it into the fire or some equally reckless manner.

It is undoubtedly the right of the expectant estates to inquire whether Briggs used his best judgment in good faith, or whether he failed to do so. If he did so use his judgment, then he was within the terms of the authority given him to dispose of the principal, but, if he failed to do so then he has not acted within the authority conferred by the will.

The power and duty of the court to determine as a question of fact whether he, in good faith, exercised his judgment, and whether, in his honest judgment, the use which he made of the property was necessary and proper, limits the power of Briggs to dispose of the

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entire estate absolutely without any possible review of his action.

In that sense, his authority is not full and complete and absolute as it would be over his own property. But any disposition of principal by him, which fairly commends itself to his judgment, is within the scope of his authority, and keeping within those lines he may dispose of it all in his lifetime for his own benefit.

He has an absolute power of disposition within the provisions of section 153 of the Real Property Law, as far as he shall exercise it, if the disposition made by him of the estate shall be according to his honest judgment necessary and proper. But the principal must be *used* by him, and may not be hoarded by him nor dispersed in bad faith. But because he may, under certain circumstances, dispose of the whole fee in his lifetime, for his own benefit, it does not follow that under all circumstances he has the same power to dispose of it that he would have if it were his own property. His power to use within his judgment in his lifetime is complete, but he has no power to devise, nor in bad faith to divert it to the use of others, his nominees.

It is urged that Briggs may not dispose of any principal, because he cannot under the authority of the law deliver possession of principal.

It is argued that the title of the property is in himself and his co-trustees *jointly* and that it may be alienated by them jointly and not severally, and that he being both a trustee and a beneficiary his co-trustee would be a necessary party to the conveyance.

The answer to this proposition is that the whole gift of title to the trustees is subject to the power of disposition given to Briggs as husband, individually, and as within the limits of the authority given to him the trust estate may be swept away by his acts out of

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the hands of both trustees as such, their possession must yield to his right to use. As to this gift of power, he is a *legatee* and not a trustee.

It is argued that because the testatrix made elaborate provisions for residuary legatees and because she designated certain sums to go to certain legatees in the events named, therefore she intended that this principal should not be alienated by her husband, but kept for the use of these residuary legatees. But the will contemplated the disposition of her estate in case her husband, or her mother, should not survive her, and these provisions made for the other legatees would have been appropriate to such a condition of affairs.

It was also possible that the husband might not find it in his judgment necessary or proper to dispose of all or perhaps of *any* of the principal, and in that event the trustees were given power, which remains until all principal is used.

It is urged that if the husband can use the whole principal, he can destroy the trust and disrupt the whole scheme of the will. This view arises from a misconception of the scheme of the will. If we read all the parts, in the light of her intention to subordinate the trust estate to the power of the husband to use principal for his benefit in the exercise of his honest judgment as to the necessity and propriety of such use, then effect is given to all parts of the will.

I cannot resist the conclusion from the whole reading of the will that the estates which were given to the other legatees were all intended to be subordinate to the authority bestowed by her upon her husband, and that the provisions for other legatees and remaindermen were intended to provide for a possible or probable remainder rather than a certain one.

It is conceded that none of the authorities cited by

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counsel are precisely parallel to this case and it is unnecessary to point out the distinctions between them and this.

The court will not undertake, in advance, to define precisely all uses to which the husband in the exercise of his judgment may devote the principal, but will leave those matters to be determined as they arise.

My attention has not been called to any authority holding that, under circumstances parallel to this case, the donee of such a power must exhaust his own estate before exercising such power for his own benefit.

The claim that the action of Mr. Briggs may not in any event be reviewed because testatrix took away all remedy by providing that in no event should he be liable for principal so used, and that therefore his title to any principal which he might seize is unassailable, is not well founded. He is not liable for any property used within the wide limits of his authority, but is liable for any aggression beyond that, and to that extent must be held accountable.

No suggestion of bad faith has been made so far as Mr. Briggs has already used the principal.

Decreed accordingly.

PEOPLE ex rel. NEW YORK RAILWAYS and TWELVE OTHER SEPARATE COMPANIES, Relators, *v.* STATE BOARD OF TAX COMMISSIONERS, Respondent, and CITY OF NEW YORK, Intervenor.

(Supreme Court, New York Special Term, September, 1917.)

Certiorari — to review special franchise assessments — street railways — no return allowed on theoretical depreciation fund — burden of proof — real property.

The franchises of the thirteen surface railroads which compose the New York City Railways system should be considered

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as one entire system, and for the purposes of special franchise assessments the value should be determined by the net earnings rule.

Where on certiorari to review special franchise assessments of said railway system it appears that a certain power plant was discarded because the relator found it more economical to purchase power than to manufacture it, and that at the time of such discarding one-half of the stipulated life of the machinery had expired, an allowance for obsolescence for the remaining one-half should be allowed during the tax year in which the discarding actually occurred, and an allowance for physical depreciation to be determined by the straight line method, and no return should be allowed to relator upon the theoretical depreciation fund.

Where it is apparent that the interest on relator's daily bank balance should be included in income, it should be allowed a return on accounts receivable, cash on hand and prepaid insurance, the amount of such items to be determined from the average amount for the whole year, in the absence of proof that relator kept an amount of accounts receivable, cash on hand and prepaid insurance, other than required for the efficient conduct of its business.

The relator having shown what moneys and property are actually used in the conduct of its business, the burden is upon defendant to show that such an amount is more than is reasonably required for that purpose.

Relator having failed to show that the amount of a so-called city loan was actually used in the conduct of its business and the interest on the loan not having been included by relator in the gross income, no return will be allowed on said loan.

There should be excluded from the gross income and from the operating expenses of the entire system the income and expense arising from the operation of cars over the Williamsburg bridge.

All the real estate used in the operation of the roads included in relator's system should be included, even though it might be possible to obtain less expensive property for the same purpose.

CERTIORARI proceedings to review special franchise assessments.

James L. Quackenbush (Ralph Norton and J. J. K. Caskie, of counsel), for relators.

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Egburt E. Woodbury, Attorney-General (Leonard J. Obermeier, of counsel), for respondent, State Board of Tax Commissioners.

Lamar Hardy, corporation counsel (Addison B. Scoville, of counsel), for City of New York.

FINCH, J. These are thirty-nine certiorari proceedings to review the special franchise assessments of each of the thirteen surface railroads which compose the New York City Railways system for each of the years, 1912, 1913 and 1914. Unquestionably, the franchises should be considered as one entire system, and the value should be determined by the net earnings rule. The stipulations of counsel have narrowed the issues to certain specific questions: *First.* What allowance should be made for depreciation? This question involves a determination of the proper allowance for physical depreciation and for obsolescence. Without attempting to define the term "obsolescence" generally, since it arises from causes widely divergent and the same rule may not apply throughout, the first instance of obsolescence with which we have here to deal is the discarding of the Ninety-sixth street power house machinery in August, 1915, because the relators found it more economical to purchase power than to manufacture it, since the invention of the turbine engine to replace the reciprocating type of engine, with which the Ninety-sixth street power plant was equipped, had decreased by one-half the cost of producing power. At the time of the discarding only one-half of the stipulated life of this machinery had expired, and allowance is claimed for the remaining half. As to the physical depreciation, the amount should be determined by the straight-line method. This method has been approved by the Court of Appeals as the proper method. *People ex rel. Manhattan R. Co.* v.

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Woodbury, 203 N. Y. 231, 235, 236. The relators, however, should not be allowed any return upon the theoretical depreciation fund, since the straight-line method of estimating depreciation is adopted. If any moneys are actually accumulated for the purpose of restoring units which have suffered depreciation, they are included in the daily balance, upon which a return is allowed herein. As to the obsolescence of the Ninety-sixth street power plant, a question arises as to when this obsolescence should be allowed. It is evident that as soon as the invention of the turbine engine became generally known as a commercial article the value of the reciprocating engine was affected, so far as removing the same and selling it to others was concerned, but that so long as the use continued the plant produced, and would have produced for the whole of its life, exactly the result produced when first installed. The sale value to others of machinery like this when once installed is only an incident. The value for use is the value to be considered. The only reason for discarding is the desire to increase the net income by decreasing the cost. This results in larger franchise taxes to the state under the operation of the net earnings rule, and under the application of equitable principles (which, after all, are the immediate guiding principles in the imposition of franchise taxes) such loss, being one phase of obsolescence, should be allowed. This use value is not therefore affected by obsolescence until the discarding takes place, so that nothing should be allowed for obsolescence until the plant was actually discarded in August, 1915. In other words, in such a case no obsolescence should be allowed until the use ceased. Since obsolescence in a case such as here presented occurs at the time discarding takes place, it follows that the allowance for such obsolescence should be made at the time when the dis-

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carding takes place. Relators seek to establish a rule by which a portion of such allowance may be spread over the years for which the taxes still remain unpaid (this result being possible here because of the refusal to pay the taxes and the resulting litigation), and hence to claim that one-third of the obsolescence should be allowed during the years 1913 and 1914. Such a rule, besides acting as an inducement for and putting a monetary premium on delay and litigation in the payment of taxes, would seem to be lacking in reason for its support. So, too, the attempt to spread the obsolescence over the future would be unsound, and the mere statement of its operation would seem to defeat the proposal. For example, if a going business should presently discard a portion of its plant and thus suffer a loss, to be consistent with this proposal it would only write off one-tenth of such loss during the succeeding year, and this would result in such business carrying as an asset for that year nine-tenths of an admitted loss, and so on in less degree for the remaining nine years. The obsolescence therefore should be allowed during the tax year in which the obsolescence occurred, since it must be allowed then or in the past or future. No allowance should be made for the alleged obsolescence of the ducts, rails or foundations, because the evidence does not sustain relators' contention that there has been any. Furthermore, the stipulations would seem to preclude such proof. Relators should be allowed a return on accounts receivable, cash on hand and prepaid insurance, it being, of course, apparent that the interest on the daily bank balance should be included in the income. The amount of the accounts receivable, cash on hand and prepaid insurance should not be taken merely as of the last day, but should be determined from the average amount for the whole year, in the absence of

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evidence that the relators kept an amount of accounts receivable, cash on hand and prepaid insurance other than required for the efficient conduct of the business. It is true that the burden is upon the relators to show what moneys and property actually are used in the conduct of the business, but having done this, the burden is upon the defendant to show that such an amount is more than is reasonably required in the efficient conduct of the business. This burden the defendant has failed to sustain in regard to the accounts receivable, cash on hand and prepaid insurance. In regard to the so-called city loan, however, the relators failed to sustain the burden that this amount was actually used in the conduct of their business, and the interest on this loan was not included by the relators in the gross income, so that no return should be allowed upon such city loan, so far as this record goes. In other words, the pertinent inquiry always is, What does normally take place in the absence of fraud or mismanagement in the actual running of the business? If the average daily balance is taken, self-interest coincides with the interest of the taxing power, since the tax saved by a larger daily balance than the business economically requires would be but a small fraction of the profit to be made by the investment of the surplus. If, on the other hand, the amount on the last day is taken as the criterion, as urged by the relators, then relators might be tempted to accumulate a larger balance than the business actually required for the one day, since the amount of tax saved thereby for the whole year might much more than offset any possible income from the investment for that day. There should be excluded from the gross income and from the operating expenses of the entire system the income and expense arising from the operation of the cars over the Williamsburg bridge. *Matter of New York Railways*

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Co., 172 App. Div. 128. It is impossible to determine these exactly, but they may be sufficiently approximated by asuming that they are apportioned to the car mileage. All the real estate used in the operation of the roads should be included, even though it might be possible to obtain less expensive property for the same purpose. It does not appear that relators have unreasonably delayed in disposing of this real estate.

Ordered accordingly.

JOHN B. COCKCROFT, Plaintiff, *v.* JOHN MITCHELL, EDWARD P. LYON, LOUIS WIARD, JAMES M. LYNCH, WILLIAM H. H. ROGERS, Composing the Industrial Commission of the Department of Labor of the State of New York, Defendants.

(Supreme Court, New York Special Term, September, 1917.)

Constitutional law — requirements of safety in factory buildings against fire — statutes — actions — industrial commission — constitutionality of section 79-b of Labor Law.

Section 79-b of the Labor Law, which establishes the minimum requirements of safety in all factory buildings erected in this state prior to October 1, 1913, for the safeguarding of employees against fire, is a valid exercise of the police power and is constitutional.

While in many instances compliance with the statute may entail hardship upon the owners of factory buildings which at the time of their erection fully complied with all existing provisions of law, that does not mean confiscation, and, unless it results from an unreasonable exercise of arbitrary power on the part of the legislature, no degree of hardship can justify the court in nullifying the statute, since it is the primary duty of the legislature to protect the common interests of the whole people even at the expense of personal or local interests.

The mere fact that the statute cannot be enforced without causing expense to the citizen who comes within its provisions furnishes no constitutional obstacle to its enforcement.

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Plaintiff is the owner of a sixteen-story building 193 feet in height, used for factory purposes, with an occupancy of over 600 persons, of whom nearly two-thirds are engaged in factory work. The building is located on one of the busiest corners of two of the busiest thoroughfares in lower New York, and its sole interior stairway used as a means of exit is not enclosed with fire-resisting materials, nor is there any exit whatever therein that conforms to the requirements of section 79-b of the Labor Law. In an action authorized by sections 52-a and 52-b of the Labor Law, to review a decision of the industrial commission of the labor department made on appeal from certain orders issued by said commission and which require plaintiff to provide additional means of exit on each floor of the building remote from the existing exit, enclose all interior stairways serving as a required means of exit and the landings, platforms and passageways connecting therewith on all sides with partitions of fire-resisting material extending continuously from the basement to three feet above the roof, and provide all openings in said partitions with self-closing doors consisting of fire-resisting materials, *held*, that section 79-b of the Labor Law is constitutional; that plaintiff's factory building is unsafe for occupants in case of fire; that the orders made by the industrial commission were reasonable and necessary to effectuate the provisions of said section 79-b of the Labor Law, and that defendants are entitled to judgment for a dismissal of the complaint.

ACTION to review a decision of the Industrial Commission of the Labor Department.

Edwards & Murphy, for plaintiff.

Robert W. Bonynge (Frederick H. Cunningham, of counsel), for defendants.

GAVEGAN, J. This is an action to review a decision of the industrial commission of the labor department, made following a hearing upon a verified appeal from certain orders issued by said commission against plaintiff's property. Its institution is expressly authorized under sections 52-a and 52-b of the Labor

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Law. Section 79-b of the Labor Law is the special object of attack herein. It requires (1) that every factory building over two stories in height shall be provided on each floor with at least two means of exit or escape from fire, remote from each other, and (2) that all interior stairways serving as required means of exit in factory buildings more than five stories high, together with their landings, platforms and passageways, shall be enclosed on all sides by partitions of fire-resisting material extending continuously from the basement to three feet above the roof.

The plaintiff is the owner of a building at No. 71–73 Nassau street, in the borough of Manhattan, city of New York, and the defendants compose the state industrial commission of the state of New York.

Stated as briefly as is consistent with clearness, the facts are as follows: The property, known as the Cockcroft building, is located on a lot 100 feet by 50 feet, at the northwest corner of Nassau and John streets, one of the busiest corners of two of the busiest thoroughfares in lower New York. It is a sixteen-story structure tenanted largely by manufacturing jewelers, with an aggregate occupancy of over 600 persons, including both sexes, of whom nearly 400 were engaged in factory work. It is equipped with one interior stairway reaching from the ground to the roof, enclosed on three sides only, with the fourth side open to the main corridor, which is separated from the working rooms on each floor by non-fireproof partitions. Directly alongside this stairway, in one fire proof but not smoke proof shaft, are the three elevators of the building, which, it appears, owing to machinery troubles, sometimes fail to operate. Leading down from the top of the building to the roof of its first floor extended is the only outside fire escape, and it is reached from the same common corridor as

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the stairs and elevators. This fire escape is substandard, without any "getaway" at its foot other than through windows. All floors, excepting the seventh, are subdivided into numerous large and small rooms, occupied mostly for jewelry manufacturing and allied industries. In this work are used motor-driven machines ranging from small drills to rolling machines, having a maximum weight of 400 pounds on a floor base two feet square. The building was constructed under the classification of "office building," with typical floors to sustain a floor load of only 75 pounds per square foot. In the manufacturing processes alcohol and other highly inflammable substances are used, but in small quantities.

These were the conditions obtaining when the defendants issued a set of orders, July 20, 1915, containing the following requirements. (1) Provide additional means of exit on each floor of building remote from existing exit. (2) Enclose all interior stairways serving as a required means of exit, and the landings, platforms and passageways connecting therewith, on all sides with partitions of fire-resisting material, extending continuously from the basement to three feet above the roof. (3) Provide all openings in said partitions with self-closing doors, consisting of fire-resisting material.

Plaintiff obtained a hearing before the commission, at which he contended that these orders were unreasonable, and asked that they be rescinded or modified. Defendants consented to a modification of the orders, which plaintiff, however, declined to accept. Refusing to comply with the original orders, plaintiff then availed himself of the right of action provided for under the statute.

Plaintiff contends, that because of the expenditure involved, together with the loss of income from the

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building consequent upon the taking of space from the offices of his tenants, said orders are unreasonable and confiscatory and therefore violate provisions of the Constitution of the United States. Defendants, on the other hand, maintain that the enactment of said statute and the enforcement of the orders thereunder constitute a valid exercise of the police powers of the state necessary for the safeguarding of employees against the dangers of fire.

The cost of carrying out the orders in accordance with the original plan is estimated at $38,151, and under the so-called variation plan $20,307. The gross annual income from the building is $110,000 and the total maintenance cost is $101,355.66, leaving a net income of $8,664,34. The property has a first mortgage of $810,000 and a second mortgage of $50,000, totaling an annual interest charge of $43,500. The building is valued at $409,293 and the plot at $707,420, making a valuation of $1,116,713 for the entire property.

The question of law involved is whether said section 79-b of the Labor Law is unconstitutional. The case also presents a cardinal question of fact, as to whether the orders issued by the defendants against the property of the plaintiff are valid and reasonable. This debatable point is to be determined from the voluminous testimony of a four days' trial; hence the added length of the opinion.

The statute assailed must stand or fall under the police powers of the state. That which was legal before its enactment has become illegal and only the exercise of the police powers of the state can justify such a change. In order to stand it must be shown that the legislature had in mind the protection of lives and also that it had sufficient ground for the exercise of its inherent police powers to bring about

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that protection. This is all made to appear in the history of the "exit" statutes themselves, which is a part of the record in the case.

Immediately after the Triangle Waist Company fire, which occurred on March 25, 1911, resulting in the loss of 146 human lives, the legislature created a commission to investigate the "existing conditions under which manufacturing is carried on, including matters affecting the life and safety of operatives as well as the security and best interests of the public."

This commission devoted two years of intelligent and conscientious labor to the subject, carrying on extensive investigations and taking a great volume of expert testimony, including testimony on the subject of exits from factories, of which this court may take judicial notice. *People* v. *Charles Schweinler Press*, 214 N. Y. 395. The resulting disclosure of conditions existing in the factories of this state brought forth a popular demand for remedial legislation. Aided by the comprehensive report of its commission, the legislature, basing its conclusions on investigation and necessity, forthwith enacted the following measures: (1) Section 79-b of the Labor Law, which establishes the minimum requirements of safety in all factory buildings in this state erected prior to October 1, 1913; (2) Section 94 of the same law, which places upon the owner of a tenement factory building the responsibility for carrying out the provisions of section 79-b, and (3), section 1275 of the Penal Law, which provides for fine and imprisonment in case of violations. In addition to complying with safety requirements, in which he has no alternative under section 79-b of the Labor Law, every owner of a tenement factory building erected prior to October 1, 1913, must also obey all orders issued pursuant thereto, since legal orders issued by virtue of this section have the full force and effect

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of law. *McRickard* v. *Flint*, 114 N. Y. 222; *Shields* v. *Pugh & Co.*, 122 App. Div. 586.

It is true that these provisions constitute a forward step in remedial legislation quite in advance of anything heretofore undertaken by the legislature in the exercise of its police powers. It is also true that in many instances, clearly so in the case at bar, compliance with these provisions may entail hardship upon the owners of buildings which at the time of their erection fully complied with all existing provisions of law. Hardship, however, does not mean confiscation, and unless it results from the unreasonable exercise of arbitrary power on the part of the legislature no degree of hardship can justify the court in nullifying legislative enactments embodying the will of the people, since it is the primary duty of the legislature to protect the common interests of the whole people, even at the expense of personal or local interests. The mere fact that the law cannot be enforced without causing expense to the citizen who comes within its provisions furnishes no constitutional obstacle to such enforcement. *Dept. of Health* v. *Trinity Church*, 145 N. Y. 32. That the police powers of the state include everything essential to the public safety, justifying the destruction or abatement of public nuisances, even to the demolition of buildings in the path of conflagration, has long been settled law. The fact that the exercise of the power may disturb the enjoyment of individual rights without compensation for such disturbance does not make laws and regulations of a public nature unconstitutional, for they do not appropriate property for public use, but simply regulate its use and enjoyment by the owner. *Dept. of Health* v. *Trinity Church*, *supra*. If the extent of the injury which would be inflicted upon private individuals were controlling upon the constitutionality of the act, then it would

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be difficult, if not impossible, to have any fixed criterion, since the cost of compliance in some cases might be very small, while in others it might equal, or even exceed, the equity of the owner. Such considerations are proper to address to the legislature, but not to the court. *Tenement House Dept.* v. *Moeschen*, 89 App. Div. 526. Even assuming "that the law is mischievous in its tendencies, * * * the responsibility therefor rests upon the legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom, annul statutes that had received the sanction of the people's representatives. * * * it is the solemn duty of the courts * * * to guard the constitutional rights of the citizen against merely arbitrary power, it is equally their duty to recognize and enforce legislative enactments embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution." *Atkin* v. *Kansas*, 191 U. S. 207–223.

Merely because it is a step in advance, section 79-b of the Labor Law cannot be said to be plainly and palpably in violation of the Constitution. It is rather one of those amendments to the structure of the law now being made with increasing frequency by a legislature which recognizes the trend of modern thought with respect to social justice. When the legislature created the factory investigating commission it sought light upon "matters affecting the health and safety of operatives as well as the security and best interests of the public." It seems obvious, particularly at this crucial time in the affairs of the nation, that "the

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health and safety of operatives" are identical with "the security and best interests of the public." Moreover, in its application to this case the "safety of operatives" necessarily includes the safety of any members of the community who have occasion to go into the building as well as of the factory operatives and other persons who are employed therein.

Until the occurrence of the Triangle Waist Company fire, in which the "exit" law may be said to have had its genesis, the legislature had apparently given no thought to the grave dangers to human life that were lurking in factories, and the lesson taught by that lamentable disaster made quick disposition of any technical barrier which might be placed in the way of the lawmakers, on the ground of class legislation. Certainly the constitutional inhibition against class legislation cannot be deemed to relate to a particular class of people who are compelled to provide safeguards for the public. "Neither is it an effective objection to a statute if some of those who will be protected by its provisions oppose such protection, for the state has such an interest in the welfare of its citizens that it may if necessary protect them against even their own indifference, error or recklessness." *People* v. *Charles Schweinler Press, supra,* 407. When the legislature made this wise provision for the safety of operatives it did no more than give recognition to a necessary inference from a universally known fact, namely, that there is grave danger to human life, not only in fire itself, but also in that instinctive fear which is born of fire in the form of panic. This to my mind is the one new and most beneficial element in the law under discussion.

Some of the cases cited by plaintiff in my opinion sustain the law he impugns. Quoted fragments of opinion therefrom are either misleading when detached from

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their context or unnecessary to the decision reached. Included in this class are the following: *Lawton* v. *Steele*, 152 U. S. 133; *Board of Health* v. *Trinity Church, supra; Atchison, Topeka & Santa Fe R. R. Co.* v. *Matthews*, 174 U. S. 96; *Tenement House Dept.* v. *Moeschen, supra; Coe* v. *Schultz*, 47 Barb. 64; *Rideout* v. *Knox*, 148 Mass. 368.

The other decisions relied on by plaintiff involve facts and present questions which are foreign to the present inquiry. They are so lacking in any basis of relevant inference as to be unavailable even for purposes of analogy. They deal with statutes which, under the guise of legislative police power, aim to deprive persons of their property or business without due process of law by declaring vested interests therein obnoxious to the public, or with statutes assumed to be for the public health, safety or morals, but which, without accomplishing that purpose, direct the confiscation or curtailment of private property or business, or finally with statutes which seek to impose regulations so unreasonable as to be in violation of the right of personal liberty. They all hold, and necessarily so, that such legislation is unconstitutional. They have no bearing here because the statute under consideration was passed for the better safety and protection of the public, its operation in this case through the orders of the state industrial commission is valid and reasonable, and the orders themselves were issued in pursuance of the design for which the law was enacted, namely, the safety and protection of a large body of the citizens of the state. Without setting forth the analysis of them which I have made in detail, suffice it to say the cases relied on by the plaintiff that are inapplicable or distinguishable on one or more of the foregoing grounds are comprised in the following list: *People* v. *Hawkins*, 157 N. Y. 1;

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Ives v. *South Buffalo R. Co.*, 201 id. 271; *Litchfield* v. *Bond*, 186 id. 66; *People ex rel. Wineburgh Advertising Co.* v. *Murphy*, 195 id. 126; *People ex rel. Standard Bill Posting Co.* v. *Hastings*, 77 Misc. Rep. 453; *Wynehamer* v. *People*, 13 N. Y. 378; *People ex rel. McPike* v. *Van De Carr*, 178 id. 425; *Matter of Cheesebrough*, 78 id. 232; *Grossman* v. *Caminez*, 79 App. Div. 15; *Signell* v. *Wallace*, 35 Misc. Rep. 656. In none of these cases was the statute assailed enacted for the public health and public safety, nor in any one does it appear that the statute upset was based upon any investigation or reason other than the arbitrary action of the legislators. Certain clauses in some of the opinions quoted in plaintiff's brief sound in harmony with his contention, but in each instance a careful examination into the facts and the scope of the decision, as distinguished from the opinion of the individual judge uttering the decision, fails to disclose any solid ground upon which to base a successful attack against the constitutionality of the law.

Leaving his authorities and coming now to the plaintiff's argument it will be seen that it is based chiefly on those familiar grounds commonly availed of when the constitutionality of a remedial statute is the object of attack, namely, that the provisions of the exit law under consideration deprive him of his property without due process of law, threaten to destroy his vested rights and deny him equal protection of the laws. But the inferences from which these conclusions are drawn are based upon assumed facts not established by the evidence. I am not convinced, for example, that the expenditure necessary to comply with the exit law in this case, under the modified plan of the orders involved, would have been, if complied with when issued, or, for that matter, will be now, either confiscatory or unreasonable. As to what it would have cost to comply

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with the original plan of the orders and whether such cost would have amounted to confiscation, these I regard as academic questions whose decision has already been obviated by the commission in the liberal exercise of its powers of modification, under the terms of the law itself.

The same considerations of unsubstantiality apply to the plaintiff's contention that, because he complied with all laws at the time of the construction of the building, the new exit law threatens a destruction of his vested property rights. If such a contention were to prevail it would make an end of all remedial legislation. Examples constantly occur, as in the case of our Tenement House Law, where individual owners are compelled to suffer similar hardships in order that a rule for the common good shall be observed. *Dept. of Health* v. *Trinity Church, supra; Tenement House Department* v. *Moeschen, supra; Matter of City of Brooklyn,* 8 App. Div. 54; *Coe* v. *Schultz, supra.*

For final objection to the constitutionality of the statute in question the plaintiff urges that the definitions of the terms "labor" and "factory building" therein constitute an arbitrary and unreasonable discrimination against other classes of owners and employees, and that the law itself is too broad because it fails to properly classify buildings in which labor is performed, thereby denying him equal protection of the laws. The answer to this is, that the primary purpose of the legislature was to protect the lives of "factory operatives," as a means to better securing public safety and in defining the word "labor" as applied to buildings affected it had in mind labor engaged in the manufacture of some material product as distinguished from the employment of those engaged in business or professional pursuits. Nor can the

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term be so construed as to apply to mechanical or manual labor which is necessary and incidental to the repair and maintenance of a building.

The ingenious illustration offered by the plaintiff to show that under the act even two employees engaged in manufacturing would make the place of their employment a "factory building," while two partners doing the same work would not, is not convincing; the latter would not create fire hazard to the same extent as the former. It is inherent in human nature that, assuming the instinct of self-preservation to be equally strong in both, the employee with only his wage at stake will create more fire hazard than the employer with his property and business at stake.

On the question of arbitrary classification of buildings, there is no analogy to be found in the custom of fire insurance companies, under which different premium rates are charged for insuring different buildings, according to risk classifications, since it ignores the distinction between loss of property and loss of life. Further classification of buildings is not required by the facts where it appears that the danger of panic as distinguished from fire itself is common to all buildings whose type of occupancy is that of laborers. I reach the conclusion that the statute is a valid exercise of the police power of the state and therefore constitutional.

The law being upheld as constitutional, it becomes necessary to consider the second proposition, as to whether the orders involved are valid and reasonable. Here I may state that the question of the orders would have to abide by the decision on the law's constitutionality, and I should decline to review the discretion of the commission, in the absence of proof showing bad faith, as a matter outside of the province of the court, were it not for the express provisions of the statute

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which call for such review. *Louisville & Nashville R. R. Co.* v. *Kentucky*, 161 U. S. 701.

The evidence shows that the building in question is a factory building and that it is not equipped in accordance with the statutory requirements for factory buildings. The state industrial commission is a legally constituted body, clothed with certain delegated legislative powers. Under the plain wording of the statute, which applies to all buildings used for factory purposes, there can be no question but that said commission had jurisdiction of the subject matter, and was acting well within the scope of its authority in issuing the orders complained of. Therefore, plaintiff's argument that the orders are invalid does not call for serious refutation, unless indeed it be based on the claim that they are unreasonable, which must in turn be proved by a fair preponderance of the evidence.

Bearing in mind the purpose of the legislature in enacting the "exit" law, the question of the reasonableness of the orders involved must be determined, not alone by standards of dollars and cents, but as well by the broader standard of humanity, in the light of its weaknesses and in the light of past experience and catastrophes, as disclosed by the evidence in the case.

It cannot be too often emphasized that the law is primarily an "exit" statute rather than merely a fire statute. The clause "adequate and safe means of escape for the occupants in case of fire" must be so construed as to give practical effect to the legislative intent which was to safeguard the lives of factory operatives. The words "in case of fire" must be so interpreted as to include all danger from fire, and it is notorious that danger from fire includes panic. Panic may result from causes not confined to a factory building itself nor affected by its fireproof character. It may be caused by smoke alone, or by fire in a building

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adjoining or in the immediate neighborhood, or by a conflagration, or by hostile attack in time of war from land, sea or air, or by earthquake, or even by a false alarm.

The reasonableness of the orders, therefore, depends directly on the answer to the question, "Is the building safe from the danger of panic?" As already pointed out, it is a sixteen-story structure, 193 feet in height, used for factory purposes, with an occupancy of over 600 persons, of whom nearly 400 are engaged in factory work. Its sole interior stairway used as a means of exit is not enclosed with fire resisting materials, nor is there any exit whatever therein that conforms to the requirements of the law, which it is the duty of the defendants to enforce.

It would be difficult to find a more vivid presentation of undisputed facts, all pointing to the same conclusion, than is contained in the record of this case; and that conclusion to my mind is, that the building is unsafe. So far from plaintiff establishing the affirmative of that proposition by a fair preponderance of the evidence, it seems to me that its negative is established by the testimony of the defense alone.

The disputed questions on the other hand are for the most part matters of opinion, from the testimony of expert witnesses on either side, the plaintiff's experts holding that the building is reasonably safe for occupants in case of fire, and the defendants' experts maintaining that it is unsafe, but that compliance with defendants' orders would make it reasonably safe.

Defendants' experts are public officers, burdened with the responsibility of carrying out the public functions intrusted to them and the fact that they are in the employ of the state should not detract from the weight of their testimony, as compared with that of experts testifying under the retainer of the plaintiff.

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Here again the distinction between loss of life and loss of property must not be overlooked and I get the distinct impression that the opinions of the plaintiff's expert witnesses would be more valuable in a question involving fire insurance than they are in a question involving safety insurance. On the other hand, the opinion of the defendants' witnesses is corroborated by my own convictions as to the safety of the building after listening to all the evidence in the case.

Much stress is laid by the plaintiff on the fact that the building is fireproof, that only four fires have occurred therein since its erection, and that these did not spread, although three of them occurred either on holidays or during hours when the building was unoccupied. This argument, however, does not take into account the danger which might have arisen from panic, as bearing upon the question of adequate exits, had these fires occurred during working hours when the building was filled with employees.

I am also unable to agree with the plaintiff that volatile oils, alcohol, benzine and other inflammable materials employed in the manufacture of jewelry do not add to the hazards of the building because they are used in small quantities and under license restrictions. Although they may be greatly reduced, dangers from such a source cannot be safely graduated on a scale of quantity. No more can the type of occupancy and alleged high standard of intelligence among the employees in the building be safely relied on as a preventive of panic in a life and death emergency. In short, a conclusive refutation of all of plaintiff's arguments respecting the safety of the building might be found in the single word "panic."

The plaintiff having failed to prove to the satisfaction of the court that the building is reasonably safe to be used for manufacturing purposes, it remains to con-

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sider the orders themselves to ascertain whether compliance with their terms would make the building safe. This refers to the variation plan of the orders, as I have already pointed out that any discussion of the reasonableness of the original orders would be purely academic.

The structural changes called for under the variation plan consist in (1) enclosing the existing interior stairway with fire-resisting material, (2) construction of an exterior screen stairway or fire escape on the north side of the building running from the roof to the second floor with described openings thereto above, and therefrom below, the second floor, (3) the construction of a fire wall throughout the building. The purpose of the last provision is to avoid the legal objection of proximity between the exits provided for in the first and second provisions, which seems to me reasonable because necessary for even a minimum compliance with the terms of the law. All three variations from the original orders are granted only during the period that "present conditions of structure and occupancy are maintained." One of these conditions is "an occupancy of about 504 persons above the ground floor," which I construe in this particular instance to mean factory occupancy. As it is obvious that the danger to life from panic would increase with the number of operatives in the building, some limitation must, of course, be placed thereon, and the one adopted by the defendants seems eminently fair and reasonable. In view of the fireproof character of the structure and adopting all other inferences most favorable to the plaintiff, I find that compliance with the foregoing provisions would render the building reasonably safe.

The estimated cost of these structural changes is $20,307, an amount $18,000 less than would have been the cost of compliance with the requirements of the

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original orders. It appears, moreover, that this cost would have been at least ten per cent less had the work been done at the time the orders were issued.

The annual rental damage, which is largely speculative, will amount approximately to only $600 under the variation plan, as against $11,000 under the original plan. As to the alleged rental damage from loss of northern light, consequent upon the installation of the exterior screened stairway, I cannot regard it as material in the absence of a right of easement thereto in the plaintiff.

In questions involving the safety of the public arguments based on loss and inconvenience to the individual are always of doubtful force. On the basis of figures recited in the statement of facts it appears that the annual net rental from the building is $8,664.34, representing, as plaintiff claims, a return of only one and forty-six one hundredths per cent on his original investment in the property, and he argues therefrom that the orders are oppressive and unreasonable because they will cause a still further reduction in an income already sadly insufficient. It is true that these figures make a poor showing, but it will be seen on reflection that the small proportion of plaintiff's income to his claimed original investment in the property must be disregarded, since it cannot be said to have been influenced in the remotest degree by the orders under discussion. A decline in real estate values is no reason for exempting a building from the expense necessary to make it safe from fire. If such a rule were adopted it would be impossible for the city to enforce any building laws involving the expenditure of money, excepting in times when real estate values were high. The percentage of actual reduction in existent net income caused by compliance with these orders might be material, but whether that income

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were twenty per cent or one per cent, or even a loss, could not affect the reasonableness of orders which had in no degree influenced prior net income. It is conceded by the plaintiff that on the basis of the variation plan the reduction in net income would be from one and forty-six one hundredths per cent to one and thirty-one one hundredths per cent; in other words, a reduction amounting to fifteen one hundredths of one per cent. I am therefore of the opinion that, considering the cost and character of the building, the expense to be incurred by plaintiff in complying with the terms of the variation orders is neither oppressive nor unreasonable.

Finally, the plaintiff would have it appear that, having complied with all provisions of the law existing at the time the structure was built, and the state having thereafter declared said provisions to be inadequate, he is now in effect being penalized for mistakes of oversight which are justly chargeable to the state itself. This contention is groundless and inept, for the evidence shows that the structure was built to be used as an office building, and that plaintiff not only diverted it from the use for which it was originally intended, but renewed leases to most of the manufacturers therein, even after the issuance of the orders complained of.

Moreover, the state can enact remedial laws only after it has been demonstrated that there are evils to be remedied. Actual experience, even human sacrifice, is often required in order to arrest the attention of the public and shock it into a realization of the necessity for remedial laws.

Experience in the matter of fire danger shows that so-called fireproof structures sometimes burn; that automatic fire alarms sometimes fail to alarm; that inside fire apparatus sometimes prove ineffective; that

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smoke from inflammable contents of fireproof buildings causes suffocation and death; that elevators sometimes refuse to work; that outside fire escapes are more serviceable as a means of entrance for firemen than as a means of escape for occupants; that the protection of the best fire department in the world is sometimes inadequate, and that persons of the highest intelligence often lose their presence of mind and become helpless victims of unreasoning panic.

All the above mentioned precautions are good, but they do not go far enough. The people of the state of New York are no longer satisfied with measures that are merely good in matters involving life and death. They insist, within reasonable limits, upon the best measures of precaution that human and legislative foresight can devise, to the end that a recurrence of such tragedies as the Triangle Waist Company fire may in the future be prevented.

I am of the opinion that the orders complained of are reasonable in their modified form and necessary to carry out the spirit of the law in this particular case. This determination, coupled with the conclusion that the law is constitutional, requires a judgment for the defendants dismissing the complaint, with costs.

Judgment for defendants, with costs.

HARRY HEILMANN, for Himself and All Other Creditors of RAYMOND A. POWELSON, Plaintiff, *v.* RAYMOND A. POWELSON and GOTTLIEB WERNER, JR., Defendants.

(Supreme Court, New York Special Term, September, 1917.)

Fixtures — action to set aside sale of — Personal Property Law, § 44.

Section 44 of the Personal Property Law, declaring that a transfer of an entire stock of goods in bulk without the pre-

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vious notice which the section requires, will be presumed to be fraudulent and void as against the creditors of the seller, has no application to a sale of fixtures only.

ACTION to set aside a sale of fixtures.

Francis M. Applegate, for plaintiff.

Herzfeld & Sweedler, for defendants.

ORDWAY, J. This is an action to set aside a sale of fixtures by the defendant Powelson to the defendant Werner on the ground that it was made contrary to the provisions of section 44 of the Personal Property Law (the Bulk Sales Act), and that the defendant Werner account for the property and pay the claim of the plaintiff, and for the appointment of a receiver. In my opinion the Bulk Sales Act does not apply here, as the sale was of fixtures only and not of merchandise. It seems to me that it was the plain intent of the legislature that the act should apply to a sale of a stock of merchandise primarily, and also to include in the prohibition fixtures pertaining to the business if sold in connection with the merchandise, but not to cover fixtures only. The repetition of the word "merchandise" and the punctuation of the paragraph, thus grouping "merchandise" with "fixtures" at each mention of the word "fixtures," after having already referred separately to the stock of merchandise, to my mind show conclusively this intent. In has been so held by Mr. Justice Mullan in the case of *Saqui* v. *Wiricks*, N. Y. L. J., Sept. 7, 1916. The Michigan case (*Brown* v. *Quigley*, 165 Mich. 237), upon which the plaintiff relies, does not seem to me to have passed upon this point, as the majority of the judges placed their decision upon the ground that the articles sold were neither fixtures nor merchandise, and the case, therefore, cannot be considered an authority upon this

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point. But even if this were not so, I am of the opinion that the purchaser complied with all the requirements of the act. The fact that there were no creditors was certified to by the seller under oath, and the act does not require that the information regarding creditors should be put in the form of an affidavit, or in any particular form. The evidence justifies the conclusion that it was practically impossible to fix the cost price of the goods mentioned in the inventory by reason of their condition, the long time they had been in use, and the alterations and repairs thereto subsequent to their purchase by the seller. In my opinion, since the defendant Werner's inquiry disclosed no creditors, although carefully made, and he knew of none, he could buy the goods even if covered by the act without inventory or notice. See the dissenting opinion of Judge Vann in *Wright* v. *Hart*, 182 N. Y. 330, 356, which was adopted and approved by the Court of Appeals in the later case of *Klein* v. *Maravelas*, 219 id. 383, 387. But even if this were not so, and it were necessary for the seller to certify under oath that he had no creditors, there is no provision of the statute which requires such certificate to be made at least five days before the transfer, and it would seem that a certificate under oath delivered at the time of the sale would be sufficient. Judgment for defendant Werner dismissing the complaint upon the merits, with costs. I have passed upon all of the requests to find and filed the same. Submit decision, including all of the findings of fact and conclusions of law actually found, in the precise language found, also final judgment.

Judgment accordingly.

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PEOPLE OF THE STATE OF NEW YORK ex rel. ROBERT S. FERGUSON, Plaintiff, *v.* DOW VROMAN and ABRAHAM WEIL, as Election Commissioners of the County of Niagara, Defendants.

(Supreme Court, Erie Special Term, September, 1917.)

Constitutional law — mandamus — statutes — unconstitutionality of — Optional City Government Law — election of city officers.
Elections — of city officers in city of Niagara Falls — duties of board of election commissioners — Election Law.

Where the duty to perform an act depends solely on whether a statute is unconstitutional and void, the question may be determined on a petition for a writ of mandamus.

The curative statute (Laws of 1916, chap. 530) by which the legislature undertook to repeal chapter 300 of the Laws of 1904, as amended (charter of the city of Niagara Falls prior to the adoption of plan C of the Optional City Government Law, enacted by Laws of 1914, chap. 444) and to grant a new charter to said city and validate the election of the mayor and four councilmen who had been selected pursuant to the Optional City Government Law which had been declared unconstitutional, is unconstitutional and void, and chapter 300 of the Laws of 1904 is still the charter of said city, and under the provisions thereof there are to be elected at the general election to be held in said city on November 6, 1917, certain city officers.

Candidates for the city offices provided for by chapter 300 of the Laws of 1904, as amended, may now be nominated by independent certificates pursuant to the provisions of the Election Law on or before October 17, 1917, and the board of election commissioners is required to do all acts necessary to have the names of the candidates so nominated submitted to the electors at the general election to be held.

APPLICATION for a peremptory writ of mandamus.

Frank S. Nicholson, for petitioner.

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S. Wallace Dempsey, for respondents Dow Vroman and Abraham Weil.

Robert J. Moore (corporation counsel), for city of Niagara Falls.

BISSELL, J. This is an application for a peremptory writ of mandamus to require the board of election commissioners of Niagara county to do all acts necessary to have submitted to the electors of the city of Niagara Falls at the general election appointed to be held on the 6th day of November, 1917, the names of certain candidates claimed to be the nominees of the Democratic party for the various offices provided under chapter 300 of the Laws of 1904 as amended. The real purpose of the application, as stated by the moving party, is to test the legality of the present scheme of government of the city of Niagara Falls; and involves the determination of the constitutionality of two acts of the legislature, chapter 444 of the Laws of 1914 and chapter 530 of the Laws of 1916. Chapter 444 of the Laws of 1914, known as the Optional City Government Law, has already been declared unconstitutional by this court in *Cleveland* v. *City of Watertown*, 99 Misc. Rep. 66, which was affirmed by the Appellate Division, Fourth Department, July 2, 1917. Plan C of this law was submitted to the voters of the city of Niagara Falls in 1914 and adopted. In 1915 city officers were chosen pursuant to plan C, and since January 1, 1916, these officers have been acting in the official capacities for which they were supposed to have been chosen.

The defendants have raised by preliminary objection the question whether a writ of mandamus may issue in a proceeding instituted to test a question of law, and claim that the petitioner does not show a clear and unquestioned right to the writ. They rest their argument upon the claim that the election of the city

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officers under the unconstitutional act of 1914, pursuant to which a "commission" or "city manager" form of government was organized, was validated by a curative statute passed in 1916, and which undertook to repeal chapter 300 of the Laws of 1904 as amended (the charter of Niagara Falls prior to the adoption of plan C), to grant a new charter to the city of Niagara Falls, and validate the election of the mayor and four councilmen, who had been selected pursuant to the provisions of the unconstitutional law of 1914.

While Merrill on Mandamus, page 65, quoted by defendants' counsel, states that "a duty which involves a decision that a law is unconstitutional is not considered to be plain," basing the declaration of the principle upon *Lynch, Ex Parte,* 16 S. C. 32, and *State* v. *Hapgood,* 30 id. 519, it is found that in this jurisdiction, in cases where the duty to perform an act depends solely on the question whether a statute or ordinance is unconstitutional and void, the question may be determined on a petition for a mandamus. This was done in *People ex rel. Carter* v. *Rice,* 135 N. Y. 473, and also in *Sherrill* v. *O'Brien,* 188 id. 185; *Matter of Reynolds,* 202 id. 430, and *Matter of Trounstine* v. *Britt,* 212 id. 421.

I am of opinion therefore that the preliminary objection should be overruled, and the application of the petitioner granted, if it shall be determined that the act of 1916 is also unconstitutional.

On January 11, 1916, the attorney-general of the state of New York gave an opinion holding that certain parts of the Optional City Government Law as attempted to be applied in the city of Niagara Falls were unconstitutional. 6 State Dept. Rep. 452.

In the month of May, 1916, there was passed by the legislature an act to provide a new charter for the city of Niagara Falls (Laws of 1916, chap. 530), which is

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the so-called curative act above referred to. This act provides (§ 6, subd. 3) that: "Until a mayor and councilmen shall be elected, as provided in subdivisions one and two, last above, the mayor and the four councilmen elected at the city election held in November, nineteen hundred and fifteen, shall be deemed respectively, the mayor and councilmen composing the council of the city of Niagara Falls during the terms for which they were respectively elected." And, further (§ 326): "The officers elected at the election held in November, nineteen hundred and fifteen, and all officers and appointees appointed by the city council, the mayor or city manager, on or since January first, nineteen hundred and sixteen, shall continue to be the officers and employees of said city for the terms for which they were elected or appointed respectively, but they shall perform the duties and be subject to the liabilities of said officers and employees as provided herein, the same as though said officers or members were elected or appointed, and had duly qualified under this act."

The petitioner contends that this so-called curative act failed to become a law because it was not presented to and approved by properly constituted officers of the city of Niagara Falls, as required by the Constitution, article 12, section 2, which provides that, after any bill for a special city law relating to a city has been passed by both branches of the legislature, it shall be transmitted to the mayor of the city, and within fifteen days thereafter returned to the house from which it was sent, stating whether the city has or has not accepted it. "In every city of the first class the mayor, and in every other city the mayor and the legislative body thereof concurrently, shall act for such city as to such bill." The defendants claim that this bill became a law by the action of the mayor and

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the legislative body of the city chosen under the unconstitutional act of 1914 acting concurrently thereon as *de facto* officers of the municipality. In *Antwerp* v. *State of New York,* 218 N. Y. 422, 427, the court says, Chase, J., writing the opinion: "An unconstitutional act is not a law; confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

It is therefore clear that the men elected in 1915 under the unconstitutional law of the previous year were never legal officials of the city of Niagara Falls, and could not as such approve or accept for the city a law relating to it as required by the Constitution. The terms of office of the mayor and two of the councilmen, which the act of 1916 attempted to continue in office "for the terms for which they were elected," do not expire until January, 1920, they having been chosen for terms of four years; and the terms of two of such councilmen will expire January 1, 1918, they having been chosen for terms of two years.

The rule regarding *de facto* officers has been adopted merely with the idea of protecting the public; and *de facto* officers are not permitted to benefit personally from what is legally a usurpation of the office. If it can be held that the act of a person holding no office whatever (although assuming to exercise the duties of an assumed office which does not legally exist) may be considered the act of a *de facto* officer, in order that such person because of such act on his part may be thereby held to be and may become an officer *de jure,* then the act of the officials of the city of Niagara Falls chosen in 1915 in accepting the act to provide a charter for the city of Niagara Falls, passed in May, 1916, is a legal act. Unless this question can be answered in the affirmative, then the acceptance by these alleged

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de facto officials of the charter of 1916, which attempted to re-create and re-confer upon them offices provided by an unconstitutional law, was a mere nullity, and no such *de jure* offices or officers exist to-day. The only legal offices and officers that exist are those provided by the charter of 1904 as amended.

The defendants' counsel contend that the acting officials of the city of Niagara Falls could legally approve chapter 530 of the Laws of 1916 as such *de facto* officers, citing *Sherrill* v. *O'Brien,* 188 N. Y. 185. There is a clear distinction between that case and the case at bar. In the *Sherrill* case the acts of the members of the legislature were held valid, and the members held to be *de facto* members, because the Constitution makes the legislature the exclusive judge of the election and the qualifications of its own members. But even if the acting officials of the city of Niagara Falls were *de facto* officers for some purposes, still there is no question in law but that their act in approving and accepting for the city chapter 530 of the Laws of 1916 was illegal and void as an act against public policy. In accepting that charter they as *de facto* public officials performed an act which accrued to their own personal benefit; that is, they undertook to approve and appoint themselves *de jure* officers of the city for long official terms. Laws of 1916, chap. 530, § 6, subd. 3; Id. § 326.

The charter of 1904 being still in existence on account of the unconstitutionality of the act of 1914, the officers last elected under the provisions of that charter were holding over in 1916, and the act of 1916 should have been submitted to them as the properly constituted officers then empowered to accept or reject the act as required by the Constitution. If the act had been rejected by them, and within fifteen days returned to the house from which it was sent, stating that it had

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been rejected, or if they had failed to act upon and had not returned the act within fifteen days, it might nevertheless again have been passed by both branches of the legislature and have become a law if approved by the governor.

The act is also violative of section 2 of article 10 of the Constitution which provides: "All city, town and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the Legislature shall designate for that purpose," because the act attempts to appoint these officials chosen under an unconstitutional law as mayor and councilmen of the city of Niagara Falls without submitting them for election by the electors of the city.

I am therefore of opinion that the act passed by the legislature and accepted by these alleged *de facto* officials in 1916 is unconstitutional and void. It follows that the act of 1914 (chap. 444) having already been declared unconstitutional, chapter 300 of the Laws of 1904, as amended, is still the charter of the city of Niagara Falls, and under the provisions of that charter there are to be elected in the city of Niagara Falls at the general election to be held on November 6, 1917, a mayor and president of the common council, a city treasurer and overseer of the poor, and an alderman for each of the thirteen wards for the term of two years each, and three assessors, one for a term of three years, one for two years, and one for one year.

The petitioner claims that at the primary election held in the city of Niagara Falls on the 19th day of September, 1917, he was unable to express his desire as to the persons he wished nominated for offices under the charter of 1904 on any official ballot presented at

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the primary, and that he consequently did so by means of an unofficial ballot, the result of which vote the board of election commissioners has refused to canvass, or to certify to the nomination of the men receiving the highest number of votes in the city for the above mentioned offices, or to place their names upon the ballot to be submitted to the electors at the general election to be held November 6, 1917, and for this reason he claims he was acting within section 81 of the Election Law.

As the returns made by the primary election officials of candidates under the 1916 charter were for offices which do not constitutionally exist, and as I am not satisfied that the use of the unofficial ballot pursuant to section 81 of the Election Law, as claimed by the petitioner, and voted by certain members of the Democratic party at the primaries held on September 19, 1917, complied with the requirements of the Primary Election Law, I do not require the board of election commissioners of Niagara county to do the acts necessary to have the names of any of the alleged nominees of the parties or persons participating in said primaries submitted to the electors. Candidates for the city offices provided for by chapter 300 of the Laws of 1904, as amended, may now be nominated by independent certificates pursuant to the provisions of the Election Law on or before the 17th day of October, 1917, and the board of election commissioners is required to do all acts necessary to have the names of the candidates thus nominated submitted to the electors of the city of Niagara Falls at the general election appointed to be held on the 6th day of November, 1917.

Ordered accordingly.

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Matter of the Application of GATES KERSBURG for a Writ of Certiorari to JAMES P. HARRITY, CHARLES L. O'CONNOR and JOHN A. GERSTUNG, Commissioners of the City of Lackawanna, New York.

(Supreme Court, Erie Special Term, September, 1917.)

Liquor Tax Law, as amended by chapter 623 of Laws of 1917 — application for writ of certiorari denied — statutes — evidence.

Upon an application for a writ of certiorari to review the determination of commissioners appointed by the mayor of the city of Lackawanna, pursuant to the provisions of the Liquor Tax Law, as amended by chapter 623 of the Laws of 1917, *held*, that one who became the owner of real estate therein before said statute took effect was legally qualified to act as commissioner.

That under subdivision 7 of section 8 of said statute of 1917 the purpose and intent is declared to be to reduce the number of places wherein the trafficking in liquor may be continued to a given ratio on October 1, 1917, and to prevent after that date the issuance of any more liquor tax certificates in excess of the given ratio.

That upon the evidence the commission so appointed by the mayor of said city has complied with paragraph 5 of subdivision 3 of section 8 of the statute in designating the places to be discontinued and those to be continued.

That as there is nothing in subdivision 3 of section 8 of said statute of 1917 upon which a claim can be based that the commission is required to perform *quasi* judicial functions and no provision for a procedure contemplating the examination of witnesses or the taking of evidence, their acts in making the selections are not judicial in character and not reviewable by certiorari.

APPLICATION for a writ of certiorari.

Lafay C. Wilke, for petitioner.

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Thomas L. Newton, for commissioners.

Aaron Fybush, for John Nowak, an interested party.

Harry V. Sanders, for the commissioner of excise of the state of New York, and the special deputy commissioner of Erie county.

BISSELL, J. This is an application for a writ of certiorari to review the determination of commissioners appointed by the mayor of the city of Lackawanna pursuant to the provisions of the Liquor Tax Law, as amended by chapter 623 of the Laws of 1917. The granting of the writ is urged upon three grounds: *First,* that one of the commissioners, Charles L. O'Connor, was not qualified to act, for the reason that he was not a taxpayer at the time of his appointment; *second,* that the commissioners failed to comply with the provisions of subdivision 3 of section 8 of the Liquor Tax Law as amended, and, *third,* that the acts of the commissioners show fraud, prejudice and partiality in the manner in which they performed their duties and carried on the functions for which the commission was created.

It appears that in the city of Lackawanna there now exist 139 places where trafficking in liquors has been engaged in under certificates heretofore issued, and that the effect of the recent amendment to the Liquor Tax Law will eliminate 108 of such places, and reduce the number of certificates that may lawfully be issued to 31. The law provides that: "Within twenty days after the taking effect of this act, the mayor of each of such cities, and the town board of each of such towns shall appoint a commission to consist of three members, who shall be residents and taxpayers of the city or town and shall not be interested, directly or indirectly, in the manufacture, production, distribution or

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sale of liquors. The persons so appointed as members of such commission shall be persons of good standing in the community and shall have had practical experience in business affairs and be acquainted with commercial and social conditions in the city or town for which they are appointed. * * * The commissioner of excise shall investigate as to the qualifications of the persons so appointed, and may approve of such appointments, in which case he shall notify the mayor or supervisor of such fact; if satisfied that any one or more of such persons are not qualified to serve as members of such commission, he may appoint other persons to serve in their places as members of such commission."

It appears without dispute that Charles L. O'Connor, the commissioner who it is claimed is disqualified because he was not a taxpayer, became the owner of a piece of real property in the city of Lackawanna on the 2d day of May, 1917, and that the law in question became effective on the 22d day of May, 1917.

The Standard Dictionary defines a taxpayer as "One who pays any tax or is liable to pay any tax."

"Taxpayer" as used in revised statute, article 3942, providing that all persons who are legally qualified voters of the state and of the county of their residence, and who are resident taxpayers in said district, as shown in the last assessment rolls of the county, shall be entitled to vote in any such school district, does not mean only those whose names appear on the last assessment rolls of the county, but means one owning property within the territory subject to taxation. To constitute a taxpayer in the meaning of the statute, it is not necessary that the taxes due on his property should have been assessed. *Hillsman* v. *Faison*, 57 S. W. Rep. 920, 922; 23 Tex. Civ. App. 398.

I am, therefore, of the opinion that Mr. O'Connor

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possessed the legal qualifications of a commissioner at the time of his appointment by the mayor and the approval of his appointment by the commissioner of excise.

Under subdivision 7 of section 8 of the amendment to the Liquor Tax Law, the purpose and intent of the amendment is declared to be to reduce the number of places to a given ratio on October 1, 1917, and to prevent after that date the issuance of any more certificates in excess of a given ratio.

By paragraph 5 of subdivision 3 of section 8 it is provided that "The said commission shall prepare a written statement containing a description of the places where such trafficking in liquors may be continued, giving the street and number, if any, and the names of the holders of the liquor tax certificates under which such trafficking was engaged in at the time of the investigation. Such statement shall also contain a like description of the places where trafficking in liquors is engaged in, for which liquor tax certificates are not to be issued for the ensuing year in order to reduce the number of places where trafficking in liquors may be engaged in under such subdivision to the ratio herein prescribed."

The petitioner claims that the commission acted illegally in describing in the statement filed by it three certain places as places where liquor shall not be trafficked in, to wit, in describing No. 1 Ridge road, under the name of Dennis Doyle, who is now trafficking in liquor at such place, and of 1310 Hamburg turnpike, under the name of William S. Bechtold, who is now trafficking in liquor at such place, and of 1560 Hamburg turnpike, under the name of John Tomaka, who is now trafficking in liquor at such place; and by then describing all of such places under the names of new occupants where the trafficking in liquors

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may be continued in, and to whom liquor tax certificates may be issued. The only effect of giving the name of a license holder at the time of the investigation was to further describe and identify the place by description. The only other purpose for which the name of a new license holder could be of any use in describing premises would be for the guidance of the state commissioner of excise in informing him as to the person to whom the license for a place should be issued. The statement prepared by the commission must be taken as a whole, and not as two separate statements, and, when it appears therefrom that places are described so that the plain intent of the commission is expressed, the law has been complied with for the purpose of carrying into effect the intent of the act. The place, No. 1 Ridge road, is described not only by the street and number, but also by the designation of Doyle as the present license holder, and this place the commission determined should be discontinued under Doyle as the holder of the license, but that a license should be given to one McDonald, who has obtained a lease of No. 1 Ridge road, the lease to take effect October 1, 1917; and for that reason in the statement No. 1 Ridge road the name of McDonald as a part of its description is designated, and from that statement the state commissioner of excise knows that McDonald on October 1, 1917, is the person who is identified with said premises. It would seem that in this proceeding neither Mr. Doyle, nor Mr. Tomaka, or Mr. Bechtold, has made affidavits, nor complained of the action of the commission, which was unanimous in designating these three places and the others composing the thirty-one places named and described in the statement as places to be continued under other persons as license holders.

I am, therefore, of the opinion that the commission

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complied with paragraph 5 of subdivision 3 of section 8 of the law in designating the places to be discontinued and in designating the places to be continued.

The petition and affidavits presented in support of the contention that the acts of the commissioners were fraudulent fail to state facts sufficient to constitute any fraud or misconduct on their part. It was perhaps to be expected that the sudden and arbitrary reduction of the number of places where trafficking in liquors could be engaged in after October 1, 1917, in the city of Lackawanna, and in other municipalities throughout the state, and which would result in the elimination of some, and the selection of others, by commissioners appointed as provided by chapter 623 of the Laws of 1917, would result in disappointment and claims of fraud, partiality and prejudice. The situation thus created opens the door to opportunities for fraud, and also to charges of fraud. But fraud must be proved by a fair preponderance of evidence, by facts, and not by conclusions of witnesses. Not only do the moving papers fail to establish facts from which a reasonable inference of fraud or misconduct on the part of the commissioners can be drawn, but the answering affidavits clearly show that the commissioners acted in good faith. Of 108 license holders who will lose their licenses on October first by the determination of the commissioners, only one has made an affidavit from which an inference is sought to be drawn which charges the commissioners with misconduct, and the allegations of this affidavit are contradicted and disproved by the commissioners.

The counsel for the commission contends that a writ of certiorari will not lie in a proceeding of this kind, and from an examination of the law I am satisfied that he is right in his contention. A writ of certiorari may only be issued as permitted by section

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2120 of the Code of Civil Procedure, which allows it in only two instances, viz., where the right thereto is conferred by statute, or where the writ may be issued by common law and has not been expressly taken away by statute. The common-law writ will issue to review only the decisions of inferior judicial or *quasi* judicial tribunals, and will not lie except where the question to be reviewed is clearly of a judicial character. *People ex rel. Republican & Journal Co.* v. *Wiggins*, 199 N. Y. 382.

The fact that public officers or agents may exercise judgment and discretion in the performance of their duties does not of itself make their action judicial in character so as to subject it to review by certiorari. *People ex rel. Schau* v. *McWilliams*, 185 N. Y. 92; *Matter of Simons* v. *McGuire*, 204 id. 253, 257.

Subdivision 3 of section 8 provides as follows:

"The commission so appointed in each of such cities and towns shall, before August tenth, nineteen hundred and seventeen, investigate as to the location of places within such city or town where trafficking in liquors is engaged in under liquor tax certificates issued under subdivision one of this section, and may inquire as to the conduct of such business at such places. Upon the completion of such investigation and inquiry, which shall be on or before September first, nineteen hundred and seventeen, the said commission shall determine as to the places within such city or town, not exceeding the ratio of one for each five hundred of the population thereof, where trafficking in liquors may be continued during the ensuing year, beginning October first, nineteen hundred and seventeen, under liquor tax certificates issued under subdivision one of this section."

There is nothing provided in this section upon which a claim can be based that the commission is re-

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quired to perform *quasi* judicial functions. There is no provision for a procedure contemplating the examination of witnesses or the taking of evidence, and the passing upon such method of reaching a conclusion. The commission's functions in making the selections are purely ministerial, calling for the exercise of judgment and discretion after investigation and inquiry. They are not judicial in character. Therefore their acts in making the selections are not reviewable under a writ of certiorari.

The application for a writ must therefore be denied, with ten dollars costs.

Application denied, with costs.

Matter of Application of WILLIAM BEWLEY for Review of Petition Designating FRANK J. MOYER, JR., as a Candidate for Member of Assembly, First Niagara District.

(Supreme Court, Niagara Special Term, September, 1917.)

Election Law, § 52 — power of court to determine eligibility of candidate for member of assembly — resignation of candidate from city office too late — duties of board of elections — Sunday.

In a proceeding to determine the duties of the board of elections under the Election Law, the court has power to determine the eligibility of a candidate for member of assembly.

The hundredth day previous to the general election to be held November 6, 1917, being Sunday, the resignation on the following day of a candidate for member of assembly from a city office is too late, and it is the duty of the board of elections of the county, under section 52 of the Election Law, to recognize the substitute petition designating another for the office of member of assembly.

MOTION to compel the board of elections of Niagara county to recognize designation filed by a committee to fill vacancy.

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J. Frank Smith, for petitioner.

W. S. Caton, for respondent.

Dow Vroman, for board of elections.

SEARS, J. This is a proceeding brought under the provisions of the Election Law to determine the rights of Frank J. Moyer, Jr., the respondent, to a position on the ballot in the Republican primary election appointed to be held on the nineteenth of September of this year.

A petition signed by a number of Republicans of the first assembly district of Niagara county has been duly filed with the board of elections of that county, designating Moyer for nomination for the office of member of assembly. Other citizens of the same assembly district have designated William Bewley, the petitioner here, for nomination for the same office. The committee to fill a vacancy named on the Moyer petition met within the time limited by the statute and upon the theory that Moyer is ineligible to hold the office of member of assembly has designated Bewley as a candidate for the party nomination in place of Moyer. The reason for the committee's determination that Moyer is ineligible is because Moyer, until very recently, has been "park and shade tree commissioner" of the city of Lockport and also "special superintendent of Lock improved street" of the city of Lockport, and it was thought by the committee and is contended by counsel for the petitioner here that Moyer is ineligible to the legislature by reason of the provisions of section 8 of article III of the Constitution of the state of New York, the first sentence of which reads as follows: "No person shall be eligible to the Legislature, who at the time of his election, is, or within one hundred days previous thereto has been,

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a member of Congress, a civil or military officer under the United States, or an officer under any city government." It is the claim of the petitioner that the positions held by Moyer above mentioned are city offices under the government of the city of Lockport and that Moyer held these offices within one hundred days previous to the date set for the coming general election.

Section 52 of the Election Law provides in its first sentence as follows: "If a candidate regularly designated for election to party position, or for a party nomination for public office, declines a designation or dies before the primary day, or is found to be disqualified to hold the office or position for which he has been designated, a committee to fill vacancies * * * which may be appointed by the signers and shown upon the face of the petition of designation, may make a new designation, to fill the vacancy so created, by making and filing with the officer, * * *" etc.

It is not necessary here to determine whether the finding in respect to disqualification is to be made, in the first instance, by the committee, or by the board of elections, for certainly, unless in the case of a candidate for legislative office the question is reserved exclusively for the particular house of the legislature to which he may be elected, this court has the right under the provisions of the Election Law to make the final determination. It is necessary, then, to consider, *first*, whether the court has power to determine whether a candidate for the office of member of assembly is ineligible for election to that body, and, *second*, whether, if it has such power, Moyer is in this instance ineligible.

The attention of the court is called to the tenth section of article III of the Constitution of the state of New York, in which the following sentence occurs: "Each house shall determine the rules of its own

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proceedings, and be the judge of the elections, returns and qualifications of its own members." Counsel for Moyer contends that the question of the eligibility of Moyer can only be determined after an election, by the house to which he may be elected. The trouble with the argument, however, is that in this proceeding the court is not called upon to determine the qualifications of a member but is called upon to determine the duties of the board of elections under the Election Law. The Election Law indicates clearly that the name of no person shall be printed upon the official party ballot at the primary if the person is ineligible to hold the office for which he has been designated for nomination. The case does not differ greatly in principle from that of *People ex rel. Sherwood* v. *Board of Canvassers,* 129 N. Y. 360, where a person who was a city officer sought a peremptory writ of mandamus to compel the state board of canvassers to issue to him a certificate of election to the office of state senator, and the court, in an elaborate opinion by Judge Earl, held that while his qualifications must ultimately be determined by the senate itself, the court could not be called upon to assist a man manifestly ineligible to the office toward obtaining credentials seemingly to entitle him to the office. Similarly here, in determining the action to be taken by the board of elections, the court must determine the question of eligibility in order that the board of elections may comply with the statute law.

Believing, then, that the court has power to consider the question of the eligibility of the designated person, it becomes necessary to determine whether Moyer did, within 100 days previous to the coming election day, hold an office under any city government. From Moyer's affidavit it appears that he filed his resignation as park and shade tree commissioner in

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the office of the mayor of the city of Lockport on Monday, the 30th day of July, 1917.

Section 9 of article III of the Constitution of the state of New York provides as follows: "The elections of senators and members of assembly, pursuant to the provisions of this Constitution, shall be held on the Tuesday succeeding the first Monday of November, unless otherwise directed by the Legislature."

The argument based upon the fact that the legislature might change the date of the election and hence that it is not possible now to determine the exact beginning of the one hundred days previous to the election is not sound. Upon such theory no question of eligibility could ever be passed upon in advance, for the statutory provision in respect to eligibility might always be changed by further enactment thereafter. We must assume, therefore, in determining the eligibility of Moyer, that the election will take place on the sixth day of November and that the hundredth day previous thereto was Sunday, the 29th of July, 1917. On his own showing it was on the 30th day of July, 1917, that Moyer resigned as park and shade tree commissioner of Lockport which is admitted by his counsel to be a city office. He was then clearly an officer under the city government of Lockport on the 29th day of July, 1917, which is within 100 days previous to the coming election day, and his resignation was too late, unless the fact that the twenty-ninth day of July was Sunday in some way extended his time to file his resignation. This cannot be the fact, for the provision of the Constitution contained in the 8th section, article III, quoted above, simply names the 100 days, not as a period within which an act is to be done, but as a period during which the candidate must not have a specified official status. Section 20 of the General Construction Law is entirely inapplicable,

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therefore, even if that statute could be used in construing the Constitution.

It is not necessary for the court to pass upon the question whether "the special superintendency of Lock improved street" was a city office, inasmuch as Moyer was a city officer within the disqualifying period as park and shade tree commissioner.

The board of elections, therefore, must recognize the substitute petition designating Bewley.

Ordered accordingly.

RAYMOND J. MILLIGAN, Respondent, *v.* MARY L. GABBETT and JOHN GABBETT, her husband, appellants.

(County Court, Onondaga County, September, 1917.)

Judicial sales — real property — summary proceedings — landlord and tenant — Code Civ. Pro. § 2232.

A purchaser of real property at a judicial sale who finds others in possession cannot, except in the particular cases provided for by section 2232 of the Code of Civil Procedure, without further proof assume that they are his tenants, and cannot by service of a thirty days' notice have the benefit of summary proceedings which are applicable only where the conventional relation of landlord and tenant is shown to exist by agreement.

APPEAL by defendants from a final order of the Municipal Court of the city of Syracuse in summary proceedings.

William M. Peckham, for appellants.

M. E. Driscoll, for respondent.

COBB, J. The plaintiff's case was made by the introduction of certain documents and papers without oral testimony. From these it appeared that in 1908

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legal title to the property in question was vested in the defendant Mary L. Gabbett. In May of that year she conveyed the same to one Mary Clune. Record title remained in Mary Clune until her death in 1915. Thereafter pursuant to proceedings in Surrogate's Court the property was sold for the payment of debts and expenses of administration, petitioner becoming the purchaser. The petition in the proceeding in Surrogate's Court alleged that defendant Mary L. Gabbett was the tenant of the propery. The defendant signed an instrument which recited that she as tenant waived the issuance and service of a citation and consented to the sale of the property. No direction was made pursuant to section 2717 of the Code of Civil Procedure for the sale of the right or interest of the defendant.

The administrator's deed was delivered to petitioner November 27, 1916. There was no proof of the tenancy of the defendants beyond the proceeding in Surrogate's Court and the above described waiver by defendant Mary L. Gabbett. There was no proof of any agreement between petitioner and either of the defendants as to the possession of the property; no proof that the tenancy, if one existed, was to terminate May 1, 1917, as alleged; in fact, no evidence beyond the waiver referred to that either of the defendants ever had been tenants. Assuming that they were, there was no evidence as to how the tenancy arose, whether it was for life, for years, at will or by sufferance; whether it arose by agreement, implication or operation of law; indeed, no evidence beyond the fact that the petitioner held the title and defendants had possession of the premises or some part thereof.

The defendants, although claiming equitable ownership of the property, offered no evidence. The peti-

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tioner contends that the proceeding in Surrogate's Court was not merely a sale of the interest of the decedent in the property, but that it absolutely divested Mary L. Gabbett of all her right and interest in the premises as lessee or otherwise.

In my opinion, the waiver by defendant Mary L. Gabbett and her consent to the sale did not operate to divest her of her estate. If a tenant for life or for years, the court could have directed that her interest be sold, in which case her share of the proceeds of the sale would have been protected. Code Civ. Pro. § 2717, as amd. by Laws of 1914, chap. 443; Code Civ. Pro. § 1568. Since this was not done, I think it cannot be said that her rights as tenant were extinguished by the sale.

But assuming that petitioner is correct in his position that the sale cut off defendant's interest as effectually as a sale under judgment of foreclosure I do not think a case was made for her removal. As stated by Judge Cullen in the case of *Greene* v. *Geiger*, 46 App. Div. 210: "These proceedings are statutory in derogation of the common law, and there is no jurisdiction to entertain them except in the cases provided by statute."

It seems to be settled that a summary proceeding under section 2231 of the Code of Civil Procedure cannot be maintained unless the conventional relation of landlord and tenant is shown to exist between the parties to the proceeding. *People ex rel Ainslee* v. *Howlett*, 76 N. Y. 574; *Reich* v. *Cochran*, 151 id. 122, 127; *Eells* v. *Morse*, 208 id. 103, 106; *Drake* v. *Cunningham*, 127 App. Div. 79. The relation must be created by agreement and not by operation of law. *Benjamin* v. *Benjamin*, 5 N. Y. 385; *Preston* v. *Hawley*, 101 id. 586; *People ex rel. Mitchell* v. *Simpson*, 28 id. 55; *Commonwealth Mortgage Co.* v. *De Waltoff*, 62 Misc. Rep. 724.

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If the sale to petitioner pursuant to the decree of the Surrogate's Court cut off absolutely the rights of those in possession of the property, do they by continuing in possession become the tenants of the purchaser at the sale? Can it be said that without an act being done or a word passing between the parties the conventional relation of landlard and tenant comes into existence and that by agreement of the parties and not by operation of law? It seems to me that these questions must be answered in the negative. Indeed, the final order which recites the facts and adjudicates the rights of the parties with considerable detail, nowhere suggests that the relation of landlord and tenant — the basis of such a proceeding — existed between the parties. The question is really whether a person buying property at a judicial sale and finding others in possession can, without any further proof, assume that they are his tenants, and upon serving a thirty days' notice have the benefit of this statutory proceeding applicable only to certain definite conventional tenancies when established by agreement.

Section 2231 of the Code of Civil Procedure provides for the removal of a tenant by his landlord. Section 2232 authorizes the removal by summary proceedings of a person holding over and continuing in possession of real property, his assigns, tenants or legal representatives after a sale under foreclosure by advertisement, or after execution sale.

The purchaser at a judicial sale, except in the particular cases provided for in the above section, cannot avail himself of this remedy. It was, therefore, incumbent on petitioner to show not only his purchase of the property with defendants in possession but also to prove that further allegations of his petition to the effect that subsequently to the sale the relation of landlord and tenant arose by agreement between the par-

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ties, followed by a failure to pay the stipulated rent or the termination of the tenancy.

In *Greene* v. *Geiger, supra,* the purchaser at a sale under judgment in a foreclosure action sought by summary proceedings to remove a tenant in possession of the mortgaged premises, who had been made a party to the action and who held over after the sale. The court, Judge Cullen writing the opinion, held that the remedy by summary proceedings was not available, since the foreclosure was not by advertisement.

If, as claimed, the relation of landlord and tenant between petitioner and Mary L. Gabbett came into existence subsequently to the sale to petitioner, there was no proof of that fact; nor does the record contain any evidence from which it can be inferred that defendant John Gabbett was ever a tenant either of petitioner or his predecessors in title.

However unsatisfactory it may be to decide a case upon a technical record where the merits are not entered upon by either party I am constrained to hold that petitioner has not shown himself entitled to the remedy sought.

The final order appealed from is therefore reversed and a new trial granted in Municipal Court, with costs to appellant to abide the event.

Final order reversed and new trial granted, with costs to appellants to abide event.

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Matter of the Judicial Settlement of the Account of BENJAMIN R. LUMMIS and the FARMERS' LOAN AND TRUST COMPANY, as Executors and Trustees of the Last Will and Testament of WILLIAM LUMMIS, Deceased.

(Surrogate's Court, New York County, September, 1917.)

Wills — terms of — construction of — when legacies not chargeable on real estate — evidence.

Where the intention of a testator to charge legacies upon his real estate is not clearly ascertainable from the terms of his will or from extrinsic evidence, legacies should not be so charged.

PROCEEDING upon the judicial settlement of the account of executors and trustees.

Bayard L. Peck, for petitioner.

Geller, Rolston & Horan, (James F. Horan and Charles A. Capron, of counsel), for Farmers' Loan and Trust Company.

William C. Orr, for Elizabeth C. Lummis.

FOWLER, S. The question arising upon the accounting involves the determination whether or not three bequests to trustees, aggregating $140,000, are charged upon the real estate of which the testator died seized and possessed. The answer depends primarily on the terms of the will of William Lummis.

Paragraph tenth of the will provides for a trust fund of $50,000, to be held in trust during two lives. The income is given to the testator's son William Maxwell Lummis, during his life, and upon his death

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to his children, if any, and if none the trustees are directed to divide the annual income amongst the testator's living children, or their issue. Upon the termination of the trust the principal sum is bequeathed to testator's children then living. In paragraph eleventh of the will a similar trust is provided for in the sum of $40,000 for the benefit of testator's daughter, Harriet Lummis. In paragraph twelfth another similar trust is created in the sum of $50,000 in favor of the testator's son John. Paragraph thirteenth is the residuary clause. This clause is similar to the preceding clauses except that the sum placed in trust is not specified, but is stated to be the residuary estate. In all four of the paragraphs a trust is created for two lives, and upon the termination of the trust the remainder interest is given to the testator's children. In addition to the foregoing provisions there are pecuniary legacies bequeathed by the will which aggregate in all $3,500.

As the net personal estate is considerably less than the amount necessary for the payment of the legacies, the question arises whether or not the residuary estate is to be encroached upon and whether or not there is a charge upon the real estate therein devised. The judgment depends upon the intention of the testator as determined primarily from the provisions of the will, and possibly from the circumstances surrounding him when he made the will. *Carley* v. *Harper,* 219 N. Y. 295.

On the assumption that parol evidence was admissible, some parol testimony of extrinsic facts, in addition to those derivable from an inspection of the account, was offered in evidence at the hearing. This evidence was all received subject to the surrogate's final decision upon its admissibility. On the part of the widow there was given in evidence a statement

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showing that four months prior to the date of the will the personal estate of Mr. Lummis amounted to $209,995. There was given in evidence by the trustees the statement of the testator's personalty as it existed at the time he made his will. At that time it appears that the personalty had decreased to about $175,000. From the testimony of Mr. Ratigan, a friend of the testator, it appeared that Mr. Lummis had complained about the extravagance of his family. This testimony was offered by the trustees for the purpose of showing that the testator knew that his estate was dwindling. Further testimony to the same effect was offered from the mouth of Mr. Peck, the attorney who drew the testator's will. Mr. Peck testified to a conversation he had with testator the day before the will was executed. At that time the testator stated to him in substance that the extravagance of his family was compelling him to live beyond his means and use up his principal. It also appears from the affidavit submitted by the widow, which was accepted in lieu of her testimony, that she has practically no estate of her own. The account shows a gross personal estate valuation of $174,858.24. The amount actually realized is $5,914.04 less. The funeral expenses and expenses of administration and debts paid amount to $28,732.06. The transfer tax was $1,100. Thus the general estate for distribution amounts to $139,112.14. As that sum includes $6,170 as a valuation of specific legacies, the net general estate is really $132,942.14, subject to commissions and expenses. That is the amount out of which provisions for legatees, amounting to $143,500, are to be satisfied, unless the deficiency is charged against the realty.

Before passing upon the competency of the extrinsic evidence offered on the hearing in this matter, it may be well to examine the principles generally controlling

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the admissibility of extrinsic evidence in cases of construction, as there is very often some misapprehension concerning them. The rule requiring a last will to be in writing is not a rule of the law of evidence. The law of evidence requires no writing for any transaction. It is the substantive law, the Statute of Frauds, or, in this instance the Statute of Wills, which requires a testamentary disposition to be contained in a writing duly attested. This being so, the ordinary question submitted in courts of construction in regard to wills is: How far the express command of the state, that the transaction shall be in writing, may be departed from by the introduction of evidence not in writing, if such evidence is calculated to supplement the written expression of the intent of the testator? The departures from the express command of the statute are determined by no principle of the law of evidence, but by principles of an equitable character, excogitated by the judges themselves from those ideal juristic conceptions, known roughly to us as equity, and once as the "law of nature." But neither these departures, nor the conceptions, are to be found in the pure law of evidence, for the common law of evidence is only a combination of rules regulating the admissibility of evidence in trials in certain courts of law. When extrinsic evidence is not permitted to vary a will in writing, it is not a rule of evidence which excludes it, but the Statute of Wills.

When a court of probate sits as a court of construction (except as to construction of legacies) it is not sitting in its natural forum, and outside of its peculiar forum, such as matters of construction for example, it is bound by the ordinary rules of courts of construction, or, in other words, by those adopted in courts of equity. In probate matters these rules are not a criterion. *Hurst* v. *Beach*, 5 Madd. 351; *Guardhouse* v.

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Blackburne, L. R. (1 P. & D.) 109. In this matter the Surrogate's Court sits not as a probate court, but as a court of construction, and consequently the rules adopted in other courts of construction are now applicable here.

In courts of construction the right of a party to introduce extrinsic evidence not in writing, for the purpose of aiding the construction or intepretation of a document required by positive law to be wholly in writing, is involved in some obscurity. Before taking up, for brief consideration, the rules applicable to such extrinsic evidence, let me advert to a corollary of the primary rule, generally laid down by the judges in courts of construction, in reference to the interpretation or construction of wills; the intent of the testator, inferable if possible from the will, is to govern construction; and such intent is to be deduced, if possible, from his written expression. This rule, it will be observed, is not peculiar to wills; it applies to all written unilateral instruments of a dispositive character. It applies *a fortiori* when an instrument is required by statute to be in writing. The difficulty with the principle last stated is that it is provisional. It does not profess to include any case where the intent is not inferable to some extent from the writing itself. Hence the common-law courts have laid down certain other principles regulating exceptions to the general rule, and these subordinate rules so regulating the exceptions are far more complicated, and even less well understood, than the general principle itself. Volumes have been written on the exceptions, some of them entirely devoid of method, some of them faulty in logic, and very few, if any, altogether scientific or philosophical in treatment.

The reputed disregard of the science of interpretation, in common-law countries, is most apparent when

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we think of the Federal Constitution. No document extant has ever been subjected to more intelligent and critical interpretation than the Federal Constitution of the United States, and yet there is not one published text book which deals scientifically with the fundamental principles governing such interpretation and construction. There are volumes enough stating topically the rules laid down empirically, their application and their cross-application, but none attempting to refer the rules themselves, abstractly and scientifically, to the metaphysical or general principles governing the interpretation of written documents. Indeed, which of the rules are *a priori* and incontrovertible nowhere appears. That this lack of scientific interest in the general science of interpretation is bound to be remedied in course of time must be apparent. But to recur to the principles governing extrinsic evidence:

When we come to inquire, "When is the intent of the testator not inferable wholly from his written will?" we find it a most difficult resolution. But it may be affirmed generally that it is whenever the written expression, with its purely verbal definitions of values, affixed to them by lexicographers or by custom, is not deemed by the court to be consistent with the real intent — then the door is opened, *sub modo,* to evidence beyond the writing. The interpretation or construction, in other words, then invokes the judicial processes known as equitable. Construction is nothing other than an attempt by the judge in equity to bring the text and the intent of a dubious writing into precise harmony with equity, with equitable probabilities, and with the higher principles of justice and reason. But a resort to this extraordinary process cannot be invoked arbitrarily. Otherwise the Statute of Wills would be practically nullified by the reception of evi-

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dence not in writing. There must be a case shown for equitable interference. The written expression must be at least dubious. If the will on its face is absolutely clear and not dubious in itself or with reference to any external circumstances, then no matter how inequitable the will may be, at common law the door is not to be opened for its amelioration beyond that possible from the written expression itself. This same general principle was fully stated in the Roman law: "*Ubi in verbis nulla ambiguitas, ibi nulla occurrit voluntatis quaestio.*" Vattel states the same general principle: "*Non licet interpretatari quae interpretatione non egent.*" Our courts and most courts of the common-law system act on the same principle. *Champlin* v. *Champlin*, 1 Sheld. 355; *Higgins* v. *Dawson*, 1902 App. Cas. 1.

But it has been said by an American jurisprudent of celebrity that "written expression has no meaning until translated into things." On this theory it is sometimes claimed, and I venture to think erroneously, that in every case where a will or other dispositive writing is up for construction or interpretation certain extrinsic things may be given in evidence in aid of interpretation or construction, viz., the situation of the maker of the instrument, or the testator, the nature of his property and the family surroundings when the will was made. Hawkins Wills, 14; *Wolfe* v. *Van Nostrand*, 2 N. Y. 440. I think this does not state accurately the common law, unless it is first made to appear that the intent of the testator or the true operation of the instrument is not deducible wholly from the written expression. Evidence of anything outside of the writing is always a resort to extrinsic evidence, and this is never permitted by the common law until some doubt is shown *prima facie*. The principle, as I understand it, in our common law is that when it is

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made to appear on the hearing that there is something dubious or ambiguous in the written expression with reference to its future operation or action on persons and things named in the will, then, and not until then, the court will look at the state of testator's property, his family and the like at the time the will was made. The old cases on this head are collected by Phillimore. Principles of Jurisp. p. 364. But where there is no ambiguity the rule is otherwise. *Higgins* v. *Dawson,* 1902 App. Cas. 1; *N. E. R. Co.* v. *Hastings,* 1900 id. 260; *Shore* v. *Wilson,* 9 C. & F. 355, 365; *Matter of Raab,* 79 Misc. Rep. 185, 188; *Matter of Farmer,* 99 id. 445; *Tole* v. *Hardy,* 6 Cow. 341; *Ritch* v. *Hauxhurst,* 114 N. Y. 512; *Champlin* v. *Champlin,* 1 Sheld. 355; Underhill Wills, § 456, and cases cited; *Morris* v. *Sickly,* 133 N. Y. 459; *Fries* v. *Osborn,* 190 id. 35. I have now alluded, very briefly, it is true, to practically all of the substantive law regarding the receipt of extrinsic evidence in the course of the interpretation of written documents. All the residue of the principles stated in the modern books are mere inferences, corollaries or exceptions, sometimes collected under the head of Evidence, but really having little to do with the substance of the law of evidence.

That a writing is to be construed according to the intention of the writer certainly is not new, for I find that it was stated to be settled law 2,000 years ago (Quintiliani Oritoriae Institutionis, lib. VII, caput V et caput VI), and this fact the Corpus Juris abundantly confirms (D. 50, 17, 96.) The Civilians are of great authority in courts of this character. There is, I may observe, much of interest on the law of wills in such out of the way Latin books as those of Quintilian or Valerius Maximus, devoted to entirely different subjects. The Digest is often clarified by matter found in Latin literature of a general nature. In this

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court and courts of like character the Latins and the Civilians are frequently consulted (*Hurst* v. *Beach*, 5 Madd. 321), as in processes of interpretation the Roman Law and the Civilians have greatly influenced the common law. Williams Wills, 94. But I am bound in this matter wholly by the principles laid down by our courts of construction, although occasionally, in the absence of precedent, the civil law may be here controlling. *Matter of Van Ness*, 78 Misc. Rep. 600; *Matter of Swarts*, 79 id. 388.

In this cause now before the surrogate there is no need to go beyond the modern reports, as it seems to be a cause where there is something dubious to consider. Consequently the extrinsic evidence of the circumstances surrounding the testator at the time he made his will is here admissible to prove or disprove an intention to charge lands. *McCorn* v. *McCorn*, 100 N. Y. 511, 513; *Brill* v. *Wright*, 112 id. 129, 135; *Irwin* v. *Teller*, 188 id. 29, 33; *Ely* v. *Megie*, 219 id. 112, 127.

But what is most generally meant in modern law by extrinsic evidence in aid of interpretation of a will is not the circumstances surrounding testator, but direct evidence of the testator's intention, *i. e.*, his declarations made outside of the written expression contained in the will itself. Now, I apprehend that it is well settled in our common law, whatever the principle may be in other systems of law, that no direct evidence of a testator's intention, as evidenced by his declarations, made either before or after the execution of his will, is admissible in our system, in a case of construction, except where there is a latent ambiguity or where a person or thing is described in the will in terms equally applicable to two or more. That is the only instance when such evidence is admissible. Thayer Ev., 482; *Matter of Vosseler*, 89 Misc. Rep. 674, 676;

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Williams v. *Freeman*, 83 N. Y. 569; Strahan, Law of Wills, 122. At this point we may observe that at common law there are two schools of thought dealing with interpretation; the liberal school, which in cases of ambiguity would admit any evidence whatever provided it was relevant, and the strict school, which would confine the admission of extrinsic evidence within the narrowest possible limits. Most common lawyers belong to the latter school. The civilians generally belong to the more liberal school. But I apprehend that in my seat I am to go not by my personal preference, which would lean to the liberal side, but by the adjudications. Now our adjudications on this head are express.

In this matter the extrinsic evidence was offered and taken subject to the objection to testator's oral declarations offered to show the intent of his will. As there was no jury in this matter I permitted such evidence to be taken, subject to all objections to its final reception. It made no real difference in a case before the surrogate alone, if evidence was taken subject to further consideration, even if it proved in the end to be incompetent, for it might then be disregarded. Meanwhile its reception or rejection had been the subject of a more careful consideration than the exigencies of the ordinary trial at bar permitted.

After due consideration I conclude that the parol evidence referred to as taken on the hearing is properly before the court in this case. Such evidence is explanatory of the circumstances surrounding the testator at the time the will was made, and it is well settled that such evidence is receivable for the purpose of determining the testator's intention to charge legacies upon his realty whenever a doubt is disclosed. Though the use of parol evidence in the construction of wills is very limited, it is permissible to examine

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into the circumstances surrounding the execution of the will when a doubt is disclosed. *Matter of Turner*, dissenting opinion of Miller, J., 142 App. Div. 645; affd., 206 N. Y. 93; *Matter of Farmer, supra.* The declarations of the testator, which have been testified to, showing that the testator appreciated the extravagance of his family, were not offered as declarations of testamentary intention, but for the purpose of showing one of the surrounding circumstances attending the execution of the will. Such declarations of a testator are not received as his expressions of his intention either to charge or not to charge legacies upon the land. They are received in order to show testator's knowledge and appreciation of the extent of his property. This is deemed a proper circumstance to be considered on the question now before the court. Even viewing them as declarations of intention, it would seem that such evidence might be admissible on the theory of "rebutting an equity." Wigm. Ev. § 2475.

The rule which makes legacies primarily payable out of personalty may be modified in its application by proof of declarations of a testator that he believed the legacies to be payable out of realty as well as personalty. But the theory for receiving declarations of intention in such a case as this is that declarations of testator's intention are admissible where there is a latent ambiguity. *Matter of Turner, supra.* Whether or not legacies are to be paid out of realty is a latent ambiguity. Where there is nothing in the will to determine out of what property the legacies are to be paid, and there is shown to be insufficient personalty for that purpose, an ambiguity immediately arises *dehors* the will.

After full consideration of all the evidence in the case, I believe there is not sufficient upon which to base a finding that the legacies are to be paid out of the

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real estate. As is the case with all questions of intention, no precedents are absolutely controlling in other cases, for all differ. The rule of law which induces courts of this state to charge legacies upon land has been so frequently reiterated that the principles involved are clear and have been exhaustively stated. Only recently in *Carley* v. *Harper, supra,* the Court of Appeals, through his Honor Judge Pound, very succinctly stated and summarized the guiding principles most commonly invoked. It has been stated that the burden is upon the legatees claiming the charge upon land. *Brill* v. *Wright,* 112 N. Y. 129. But even if the language of the court in that case is susceptible of the meaning, that such burden rests, both as a matter of fact and of law, on the legatees, the more recent decisions of the Court of Appeals, culminating in *Carley* v. *Harper,* seem to lighten such burden, if not to remove it entirely.

The situation of the rule at the present time seems to be this: the distinction between realty and personalty in wills is not to be overlooked. The courts, however, seem to take notice of the failure of the average testator to appreciate any such difference. If the language of the will is susceptible of the meaning, that realty and personalty are to be used alike in satisfaction of the legacies. a charge upon the realty will be imposed. Simultaneously with the apparent inclination of courts to lighten the presumption against imposing charges upon land in favor of legatees, another presumption — that the testator intends payment in full of the legacies bequeathed by him — has gained in force. The real question in each case of construction seems to be whether or not the will, when construed in the light of extrinsic circumstances, evinces an intention that the legatees should be paid at all events. It is for that reason that throughout this case

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before me so much stress has been placed upon the amount of personalty owned by the testator at the time of his testament. Where the personalty is grossly out of proportion to the legacies the courts are inclined to impose a charge upon the land; otherwise the will would be a vain and a useless act on the part of the testator. See *McGoldrick* v. *Bodkin*, 140 App. Div. 196.

The blending of realty and personalty in a residuary clause, the existence of a power of sale and the direction to pay inheritance taxes out of the residuary estate, while worthy of consideration, are never absolutely controlling in determining charges on land. Those circumstances are frequently referred to in the opinions of appellate courts, but the dominating factor has always been the amount of personalty on hand at the time the will was executed. In the case now before the surrogate the usual argument is predicated of the existence of a power of sale, the blending of the realty and personalty in the residuary clause and the direction to pay the inheritance taxes. The contrary argument, in favor of the contention of the widow, is just as strong, based upon these same premises. A power of sale is often put in a will because the precedents will have it so and because such a power may in some way at some time prove valuable. The express direction to pay the taxes out of the residuary estate may be regarded as an indication that the legacies themselves were not so payable, especially where the will was drawn by an attorney. The blending of realty and personalty in a residuary clause was stated in *Brill* v. *Wright, supra,* of itself not to be a dominant consideration. *Irwin* v. *Teller,* 188 N. Y. 25.

The learned counsel for the trustees argued that the conjunction of the word "devise" with the word "bequeath," and "rents" with "income and

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profits," in the paragraphs of the will creating the three trusts indicates testator's intention to establish these trust funds out of the realty. This conclusion does not necessarily follow. The testator merely referred to a sum of money. The use of the words "devise" and "rents" seems to be the result of inartificial expression and the too servile following of some familiar precedent or formula. The argument of the trustees is not fortified by looking at the power of sale in this connection. Were the power to be exercised it could only operate on personal property, and there was no occasion whatever for the use of the words "devise" or "rents." It would seem, then, that the testator did not contemplate the exercise of the power of sale so far as the creation of the three trust funds is concerned.

In many wills, where a charge has been implied, children or close relatives were aided at the expense of strangers. In this case nothing would be left for the widow were the contentions advanced in favor of the children to prevail. Moreover, the testator has not made even a suggestion that the children are to be preferred beneficiaries. The three trusts for the latter are in similar form to the one for Mrs. Lummis. The legacies are of particular amounts of money, whereas the widow is given the income of the residue of both the realty and the personalty. The will has every appearance of an intention to give the specific amounts to the children, solely because the testator then believed his fortune large enough for all his testamentary purposes. Two years elapsed between the making of the will and its probate. During that time the evidence does not show an intention to resort to the realty for the purpose of discharging the legacies. But subsequent events are not admissible evidence on this point. *Morris* v. *Sickly*,

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133 N. Y. 456. The Court of Appeals, however, in *Carley* v. *Harper, supra,* said that subsequent reduction of personalty and the increase of realty have a bearing upon the question. The court cites *Scott* v. *Stebbins,* 91 N. Y. 605, apparently overlooking *Morris* v. *Sickly* to the contrary.

It is very probable that the testator never conceived of the situation which now presents the real difficulty. It is often the fact that a court of construction must resolve hypothetical intentions which were really not present when an instrument was drawn and executed. This is notably so in the instance of instruments operative *inter vivos* as well as with last wills and testaments. In a certain class of written contracts subsequent uncertainties of meaning frequently arise from the use of careless expressions of intention, or by reason of the incompleteness of comprehension on the part of the parties to the writing. One well-marked illustration is a contract where the court must imply a condition as matter of law. The reason assigned for such an equitable interpolation is the failure of the parties to foresee a contingency which, when it later arises, must be construed as to its legal effect upon the rights and the obligations of the parties. When the contract refers to the sale of the product of a particular factory, for example, the destruction of the factory during the vendor's performance excuses further deliveries, even though the contract is silent concerning such an accidental interruption. The law will then imply a condition. This is so not because any particular language of the writing suggests such an excuse for the vendor, but because a court of equity assumes that the entire scope and subject matter of the contract points unmistakably to the inference that the parties really intended such a provision in the contract. Though the court of construction appreciates the absence of any expressed

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intention, one is nevertheless generally supplied. This is not an objectionable interpolation of language into the contract, but the *interpolation of an intention* gathered and construed from the intention expressed and the extrinsic facts. So with cases of wills where the testator fails to state what should be the legal consequences of the instrument, in certain contingencies, a court of construction may place itself in his position and read as a portion of the will what the language requires. The court then merely attributes to the testator the effect which, placing itself in his position when he made the will, it can see he must have intended.

The real question is often disguised in courts of construction. It is, What is the proper construction when there is no evidence of intention either inside or outside of the will? A few observations on this point will do no harm. The usual method of dealing with such exceptional cases does not violate any of the cardinal rules relating to the construction of wills. It is the identical process and basis upon which courts of equity have always proceeded to construe wills. An admission that the testator had no real intention upon the question which the court is resolving by construction is only a frank avowal of what is plainly manifest in too many cases on wills. The construction of a will in such a case is then purely a matter for equity. It is different from a literal interpretation of the express language. *Matter of Catlin,* 97 Misc. Rep. 223. The effect of certain provisions in a will alone is to be resolved.

When precedents must be relied upon exclusively for extracting the intended legal effect from the language contained in the instrument, a court of construction should not make any pretense of ascertaining the real intention when none exists. It is not then ascertain-

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ing the intention, but expounding equitably an intention which equity assumes to be the real intention. The intention is but the court of construction's understanding of the effect of the language of the instrument as applied to the circumstances given in evidence. The prohibition against constructing a will (*Herzog* v. *Title Guarantee & Trust Co.*, 177 N. Y. 86) is not then violated. The court need not then indulge in conjecture nor enter upon speculation nor offend an established rule of the courts by supplying language. *Dreyer* v. *Reisman*, 202 N. Y. 476. All that properly need be done is to apply equitably the inference raised from the express language as courts usually apply it.

A frank appreciation that, in many cases on wills, particularly those where such a question as that now here is up for consideration, the court is not really interpreting the language of the testator, but is equitably expounding the effect of the provisions of the instrument, would be far more conducive to precision and system in the law of construction than to assume that the court must gather the testator's intention when it is plain that none in fact ever existed. Subordinate rules of construction will then not be so often misapplied. The paramount desiderandum in every case on wills should be an equitable determination. Particular provisions and claims of the will should not be used as a fanciful structure upon which to rear an intention which the whole language of the testament shows that the testator never entertained.

But be this as it may, the contention that the legacies by way of trusts in paragraphs ten, eleven and twelve of the will of Mr. Lummis were charges upon the realty ought not to prevail in this case.

Decreed accordingly.

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Matter of the Estate of ALICE D. W. CHAUNCEY, Deceased.

(Surrogate's Court, New York County, September, 1917.)

Executors and administrators — when executor not compelled to file bond — accounting — bonds — Code Civ. Pro. § 2569(6).

An executor to whom letters testamentary have been issued may not be compelled to file a bond; if thereafter his circumstances do not afford the legatees and creditors adequate security their remedy is by an application under section 2569(6) of the Code of Civil Procedure for the removal of the executor.

The failure of an executor to appear before the referee to whom his accounts have been referred and testify in regard to the objections filed thereto is not a ground for his removal, the burden of sustaining the objections being upon the objectors.

An allegation in a petition to compel an executor to file a bond, or in the alternative to revoke his letters testamentary, that petitioners were unable in the proceeding to effect personal service of the citation upon the executor is insufficient to warrant the court in removing him.

It is not sufficient that the petition alleges in the words of the statute that the executor's circumstances are such as not to afford adequate security to the creditors and legatees interested in the administration of the estate, but facts must be alleged from which the court may conclude that the financial condition of the executor does not afford such security.

APPLICATION for an order directing the executor of decedent's estate to file a bond.

John T. Easton, for executor.

Stern, Barr & Tyler (Eliphalet W. Tyler, of counsel), for Harriet A. Glen et al., petitioners.

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Griggs, Baldwin & Baldwin, for claimant St. George Fechtig.

Roe & Hayes, for claimant Miner D. Randall.

FOWLER, S. This is an application for an order directing the executor of decedent's estate to file a bond, or in the alternative to revoke the letters testamentary issued to him by this court on the 30th of July, 1914.

The surrogate has no power to compel the executor to file a bond at this time. The objection that the circumstances of a person named as executor in a will do not afford adequate security to the legatees or creditors should be made before letters are issued. Code Civ. Pro. § 2564. After letters are issued, if the circumstances of the executor do not afford the legatees and creditors adequate security, their remedy is by application to remove the executor under subdivision 6 of section 2569 of the Code, and not by an application to compel him to file a bond.

As the petitioners herein ask for the alternative relief, however, it becomes necessary for the surrogate to determine whether the allegations of the petition show that the circumstances and financial condition of the executor do not afford adequate security to the creditors and persons interested in the administration of the estate.

The executor resides in this city. He has also a place of business in this city. He filed his account as executor in this court, and objections thereto having been filed by alleged creditors the matter was referred to a referee to hear and determine the issues raised by the objections. The referee has not yet filed his report, but he has submitted an affidavit in which he states that he has been unable to file a report owing to the

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difficulty he has experienced in compelling the executor to appear before him and testify in regard to the objections.

There is no allegation that the executor is in financial difficulties, or that he is without means; nor are there any facts stated from which the court could reasonably infer that the financial condition of the executor does not afford adequate security to the creditors and legatees. His failure to appear before the referee is not a ground for his removal. The burden of sustaining the objections to the account is upon the objectors, and it is no part of the duties of the executor to appear before the referee for the purpose of proving the statements contained in the objections filed to his account. Neither is the allegation of the petitioners to the effect that they were unable in this proceeding to effect personal service of the citation upon the executor sufficient to warrant the court in removing him. It is not sufficient that the petition states the words of the statute that the circumstances of the executor are such as not to afford adequate security to the creditors and legatees; facts must be stated from which the court may conclude that the financial condition of the executor does not afford adequate security to those interested in the estate.

The application to compel the executor to file a bond, or, in the alternative, to revoke his letters, is denied.

Application denied.

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Matter of the Estate of LEWIS RADFORD, Deceased.

(Surrogate's Court, New York County, September, 1917.)

Wills — construction of — trusts — vested remainder — intestacy.

Where the general scheme of a will indicates that it was the intention of testator, who was survived by a son and two daughters, that the son, or in case of his death his issue, should ultimately receive the major part of the estate which he divided into three parts to be held on separate trusts during the lifetime of each of his children, and the son died leaving him surviving three children all of whom are living, and thereafter S., one of testator's daughters, died without issue, under a clause of the will that "Upon and immediately after the death of my said daughter Sarah, I give and bequeath the said equal third part of my estate hereby given in trust for her to my said daughter Carrie and my said son William, in case they shall both be then living, to be equally divided between them forever; and in case my said daughter Sarah shall survive my said daughter Carrie, then and in such case, I give and bequeath the whole of the said equal third part hereby given in trust for my said daughter Sarah, from and after her death, to my said son William, or in case of his previous death, then to his lawful issue forever," the gift over on the death of S. will be construed as a vested remainder in the surviving daughter, C., and the son, and in the event of his death before S. his issue became entitled to receive the one-half their father would have taken had he survived S.

While such construction may not seem to give effect to the words "in case they should both be living," a literal application of said phrase would enforce intestacy as to the trust fund, a result certainly not within the contemplation of testator.

PROCEEDING upon the judicial settlement of the account of a surviving trustee.

Charles V. Gabriel, for Carrie Westerfield and executors of the estate of Sarah C. Doty, deceased.

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Misc.] Surrogate's Court, New York County, September, 1917.

Burlock E. Rabell, for himself as trustee of the estate of William L. Radford, deceased.

R. A. Mansfield Hobbs (Henry Wynans Jessup, of counsel), for Annie C. R. Watts, respondent.

Henry Pegram, for Amelia M. Christie.

Caldwell & Banister, for Mary R. Burtis.

FOWLER, S. The question presented to the surrogate for determination arises in the course of the judicial settlement of the account of the surviving trustee under the will of Lewis Radford, deceased. It involves the true construction of the will of said Lewis Radford.

Lewis Radford, the testator, died August 10, 1899, leaving a last will executed November 27, 1891. Testator by his will divided his entire estate into three separate parts, to be held on separate trusts during the lifetime of each of testator's three children, viz., two daughters, Carrie Westerfield and Sarah C. Doty, and one son, William L. Radford. The gifts over, or remainders, upon the termination of the several trusts are separately bequeathed. With respect to the trust estates created for the daughters, the will provides that upon the death of each daughter the estate or fund held for her benefit shall be divided equally between the other daughter and the son, if both be living, with the further provision that in the event such other daughter shall have died before the life tenant, then the entire trust estate shall be given to the son, or in case of his previous death then to his lawful issue. The will further provides that the trust estate created for the son shall upon his death go to his issue. The three children of testator mentioned in the will were living when the testator Lewis Radford died. The son

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William died March 28, 1913, previous to his two sisters, leaving him surviving three children, all of whom are now living. One of the two daughters of the testator, viz, Sarah C. Doty, died December 11, 1916, leaving no issue. The other daughter, Mrs. Westerfield, is living and is the petitioner and accounting trustee in this proceeding.

The principal of the separate trust estate held for the life of Sarah C. Doty is $85,852.58, and the matter for determination involves the proper disposition of this sum. The clause of the will of Lewis Radford disposing of the principal of this particular trust estate upon the termination of the life interest is as follows: "*Fourth:* Upon and immediately after the death of my said daughter Sarah, I give and bequeath the said equal third part of my estate hereby given in trust for her to my said daughter Carrie and my said son William, in case they shall both be then living, to be equally divided between them forever; and in case my said daughter Sarah shall survive my said daughter Carrie, then and in such case, I give and bequeath the whole of the said equal third part hereby given in trust for my said daughter Sarah, from and after her death, to my said son William, or in case of his previous death, then to his lawful issue forever."

It is now claimed, upon behalf of Mrs. Westerfield, that under this fourth clause of her father's will she is entitled to one-half of the Doty trust estate, and that by reason of the previous death of William before Sarah, there is an intestacy as to the other half, as of the date of testator's demise, and that Mrs. Westerfield therefore takes also one-half of that, or, in other words, two-thirds of the entire Doty trust estate, and that the balance passes equally to the personal representatives of Sarah C. Doty and William Radford. Upon the part of the children of William Radford it is

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contended that the remainder over was vested in their father, and that upon his previous death it passed to them.

The general scheme of the will of Lewis Radford indicates the intention of the testator, that his son William, or, in case of William's death, the issue of William, should ultimately receive the major part of testator's estate. It is this intention, ascertainable from a consideration of the whole instrument and the situation of the parties, that should govern the surrogate in his construction of the fourth clause of the will of Lewis Radford. *Fulton Trust Co.* v. *Phillips,* 218 N. Y. 573, 580.

Bearing in mind this evident intention of the testator, it is my opinion, that the gift over on the death of Mrs. Doty was a vested remainder in the surviving daughter and the son, and, in the event of the death of the son before Mrs. Doty, the issue of the son became entitled to receive the one-half he would have taken had he survived his sister, Mrs. Doty. *Connelly* v. *O'Brien,* 166 N. Y. 406; *Matter of Gardner,* 140 id. 122, 129; *Fulton Trust Co.* v. *Phillips,* 218 id. 573. Vested remainders are descendible. While this construction may seem not to give effect to one part of the fourth clause, viz, "in case they shall both be living," a literal application of this phrase would enforce intestacy as to this entire trust fund, a result certainly not within the contemplation of the testator.

Under my construction of the will one-half of the Doty trust estate passes to Mrs. Westerfield and the other half to the children of William Radford, deceased.

Decreed accordingly.

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ALEXANDER BERKMAN, Plaintiff, *v.* NEW YORK PRODUCE EXCHANGE BANK, Defendant.

(Municipal Court of the City of New York, Borough of Manhattan, First District, September, 1917.)

Judgments — motion for judgment on the pleadings granted — motions and orders — banks — Code Civ. Pro. § 2446.

A judgment debtor's bank account can only be reached, after the return of an execution unsatisfied, by an action in equity or by proceedings supplementary to an execution, in accordance with section 2446 of the Code of Civil Procedure, which provides that a person indebted to a judgment debtor may be permitted by order to pay to the sheriff a sum not exceeding an amount which will satisfy the execution.

In the absence of such an order, the voluntary payment by a bank of a depositor's balance to a United States marshal to be applied on account of a fine imposed by a federal court convicting the depositor of a felony is not available as a defense to an action by the depositor against the bank to recover said balance.

MOTION for judgment on the pleadings.

Harry Weinberger, for plaintiff.

Reeves & Todd (William P. Dalton, of counsel), for defendant.

SPIEGELBERG, J. This is a motion for judgment on the pleadings. The complaint in substance alleges that the plaintiff was a depositor with the defendant and that on July 12, 1917, there was a balance of $417.83 due to him, which sum the defendant refused to pay, although demand therefor was duly made. The answer sets up as a defense that the plaintiff on July 9, 1917, was adjudged guilty of a felony in the United

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States District Court for the Southern District of New York, and was sentenced to imprisonment for a term of years, and in addition thereto was fined the sum of $10,000; that said fine of $10,000 remaining unpaid, the United States marshal of the Southern District of New York, by virtue of said judgment, seized the balance of the moneys on deposit with the defendant, and that said marshal deposited the sum with the treasurer of the United States to be applied on account of said fine of $10,000. The facts alleged in the answer constitute no defense to the plaintiff's claim.

The United States marshal has no greater powers in executing a judgment than a sheriff. It is provided by federal statute that: "The party recovering a judgment in any common-law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such State laws, as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise." 3 U. S. Compiled Statutes, 1916, § 1540; U. S. R. S., 1916.

In pursuance to the statute the District Court of the United States for the Southern District of New York adopted the following rule: "In common law causes the parties shall be entitled to the same rights and remedies as respects attachments against the property of the defendant, and as respects proceedings supplementary to execution as are now or may be hereafter provided by the laws of the State of New York, which laws (in respect of common law causes)

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are hereby adopted by this Court." Common Law Rule No. 4, District Court of the U. S. for the Southern District of N. Y., in effect February 1, 1913.

It has been repeatedly held that marshals in each state in executing the laws of the United States shall have the same powers as sheriffs in executing the laws of the state. 2 U. S. Compiled Statutes, 1916, § 1312; U. S. R. S. § 788; *United States* v. *Harden,* 10 Fed. Repr. 802; *Matter of Neagle,* 135 U. S. 1, 68.

The powers of the marshal to enforce the judgment against the plaintiff are therefore to be measured by those of the sheriff under a judgment of this state. It is well settled that the relation between a bank and its depositor is that of debtor and creditor, and that the money deposited with a bank becomes the bank's own money as a part of its general funds. This rule has been recently reiterated in *Baldwin's Bank* v. *Smith,* 215 N. Y. 76, 82. Following the general rule that at common law choses in action are not the subject of levy under an execution (*Duffy* v. *Dawson,* 2 Misc. Rep. 401), it becomes apparent that the money which the plaintiff deposited with the defendant could not be seized under the execution against him. *Carroll* v. *Cone,* 40 Barb. 220. The *Carroll* case was affirmed by the Court of Appeals as appears by reference thereto in *Baker* v. *Kenworthy,* 41 N. Y. 215, 216. A judgment debtor's bank account can only be reached, after the return of an execution unsatisfied, by an action in equity or by proceedings supplementary to an execution, in accordance with section 2446 of the Code of Civil Procedure, which provides that a person indebted to a judgment debtor may be permitted by order to pay to the sheriff a sum not exceeding a sum which will satisfy the execution. In this case no order was obtained, and the payment by the defendant to the marshal was in clear violation of the statute. The

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payment must be considered as voluntarily made and is not available as a defense to the plaintiff's claim. *Knights of Pythias* v. *Manhattan Savings Institution*, 12 Misc. Rep. 626.

The plaintiff's motion for judgment on the pleadings is granted.

Motion granted.

MARY SEMMEN, Respondent, *v.* BUTTERICK PUBLISHING COMPANY, Appellant.

(Supreme Court, Appellate Term, Second Department, September, 1917.)

Workmen's Compensation Law, § 13 — employee may not maintain separate action to recover from employer — services — statutes.

Under section 13 of the Workmen's Compensation Law, an injured employee may not maintain a separate and independent action to recover from an employer who neglects or refuses, after due request, to provide any of the medical, surgical or hospital services referred to in said statute.

APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, fourth district, rendered June 25, 1917, in favor of the plaintiff for $185.40 damages and costs, after a trial by the court and a jury, and from an order entered on June 29, 1917, denying defendant's motion to set aside the verdict and for a new trial.

Burt L. Rich, for appellant.

Sidney A. Clarkson, for respondent.

BENEDICT, J. This is an action for $164.40 claimed to have been expended by plaintiff for medical services, hospital charges and medicines, required on account

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of personal injuries sustained by her while employed in defendant's factory. The answer was a partial denial. On the trial, before the court and a jury, there was a verdict for the plaintiff for $164.40, upon which judgment was rendered on June 25, 1917. Defendant appeals from the judgment and from an order denying its motion for a new trial.

Section 13 of the Workmen's Compensation Law, under which the plaintiff claimed the right to maintain this action, provides as follows:

"*Treatment and care of injured employees.*— The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus as may be required or be requested by the employee, during sixty days after the injury. If the employer fail to provide the same, the injured employee may do so at the expense of the employer. The employee shall not be entitled to recover any amount expended by him for such treatment or services unless he shall have requested the employer to furnish the same and the employer shall have refused or neglected to do so. All fees and other charges for such treatment and services shall be subject to regulation by the commission as provided in section twenty-four of this chapter, and shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living."

As I read this section there is no authority for bringing a separate and independent action by an injured employee in the courts of the state to recover from an employer who neglects or refuses, after due request, to provide any of the medical, surgical or hospital services referred to in the act. The Workmen's Compensation Law, as enacted by chapter 816 of the Laws

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of 1913, placed employers and employees on a new and different basis with respect to compensation for injuries to the employee happening through accident and without regard to fault from any previous law or statute. It was devised to afford to employees a speedy hearing, and an inexpensive and final adjudication of claims for disability or death while engaged in the discharge of their duties or in the course of their employment, "without regard to fault as a cause of injury." The act was not intended, as was the case with the employer's liability clauses of the Labor Law, as an auxiliary to, or extension of, the common-law rights of the employee. On the contrary, it operates to the exclusion of the common-law rights and liability of master and servant in so far as it extends to accidental injuries sustained by the employee while engaged in any of the various sorts of hazardous employments which are mentioned in the statute. The two remedies do not coexist nor proceed *pari passu*. Compensation given by the Compensation Act cannot be supplemented by compensation afforded by the courts of common-law jurisdiction. Hence, unless compensation for personal injuries be held not to embrace compensation for the expense incurred by the injured employee in his efforts to regain health, there can be no separate recovery by action in the courts on account of such expense. It must be recovered as a part of the compensation awarded by the commission. That this is so, I think, is plainly indicated by the definition of "compensation" as contained in the statute itself, section 3, paragraph 6, where it is said to be "the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein." Furthermore, by section 13 it is provided that: "All fees and other charges for such treatment

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and services shall be subject to regulation by the commission as provided in section twenty-four of this chapter, and shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living." The provision of section 24 is that " claims for services or treatment rendered or supplies furnished pursuant to section thirteen of this chapter, shall not be enforceable unless approved by the commission. If so approved, such claim or claims shall become a lien upon the compensation awarded, but shall be paid therefrom only in the manner fixed by the commission."

Reading these provisions together it seems to me that the legislature intended to invest the commission with full power over such claims and with full power to " enforce " them in the manner provided for the enforcement of payments in default, contained in section 26.

If this were not the intention I think the legislature would have indicated that these claims, when approved by the commission, should be enforcible by action in the courts possessing common-law jurisdiction. Otherwise the employer is shut out of any defense to such an action, if brought in these courts, since the claims, when once approved by the commission, appear to be incontestable and collectible not by virtue of execution, but payable from the compensation upon which they, by force of the statute, are made a specific lien.

These views are, I think, supported, if not by authority, at least by reason and analogy. In *Matter of Jensen* v. *Southern Pacific Co.*, 215 N. Y. 514, Judge Miller, all the judges concurring, says: " The scheme of the statute is essentially and fundamentally one by the creation of a state fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental inju-

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ries sustained by employees engaged in certain enumerated hazardous employments. * * * By insuring in the state fund, or by himself or his insurance carrier paying the prescribed compensation, the employer is relieved from further liability for personal injuries or death sustained by employees. Compensation is to be made without regard to fault as a cause of the injury * * *. Compensation is not based on the rule of damages applied in negligence suits *but in addition to providing for medical, surgical or other attendance or treatment and funeral expenses* [italics ours] it is based solely on loss of earning power [page 519]. * * * When he enters into the contract of employment, he is now assured of a definite compensation for an accidental injury occurring with or without fault imputable to the employer and is afforded a remedy, which is prompt, certain and inexpensive. In return for those benefits he is required to give up the doubtful privilege of having a jury assess his damages, a considerable part of which, if recovered at all after long delay, must go to pay expenses and lawyers' fees." Page 527.

In *Matter of Walker* v. *Clyde Steamship Co.*, 215 N. Y. 529, 531, the same judge remarked: "The remedy provided by the Workmen's Compensation Act is a substitute for the common-law remedy." He held that it operated as an exemption of all employers who complied with its requirements from suits at common law.

In *Miller* v. *New York Railways Co.*, 171 App. Div. 316, in considering this act, Mr. Presiding Justice Jenks, in construing section 29, providing for an election of remedies in the special case therein mentioned, held that the employee's decision to accept the compensation under the act constituted an election of remedies and estopped him from any other remedy, and he quoted from *Birdsall* v. *Coolidge*, 93 U. S. 64,

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for a definition of compensation, where the court says: "Damages are given as a compensation, recompense or satisfaction to the plaintiff for an injury actually received by him from the defendant. Compensatory damages and actual damages mean the same thing; that is, that the damages shall be the result of the injury alleged and proved, and that the amount awarded shall be precisely commensurate with the injury suffered, neither more nor less, whether the injury be to the person or estate of the complaining party. 2 Greenleaf on Evidence (10th Ed.) sect. 253."

I think it cannot be supposed that the legislature intended to split the compensation for an injury into two parts, one recoverable according to the course of the common law, the other exclusively enforcible through the provision of the statute. In section 20 of the act it is provided that, "The decision of the commission shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law." If the compensation commission err in the decision on the application made to it, such error can only be corrected upon an appeal to the Appellate Division of the Supreme Court in the third department. Its decision upon questions of fact is, unless reversed in that court, *res judicata* between the parties. See *Naud* v. *King Sewing Machine Co.*, 95 Misc. Rep. 676.

In *Bloom* v. *Jaffe*, 94 Misc. Rep. 222, the Appellate Term in the first department held that the physician who held an assignment from an employee of the portion of the award which was included as compensation for medical services could not maintain an action against the employer. The court, speaking through Lehman, J., says: "As part of this compensation it provides in section 13 for medical service at the expense of the employer, and where the employee has

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been compelled to procure such service himself the law makes provision for the inclusion of a claim for such service in a proper case in the award made to the employee. The primary purpose of the statute is not, however, to provide compensation to the physician, but solely to provide compensation to the injured employee for such medical service as the law permits him to procure at the expense of the employer." See, also, to the same effect *Hirsch* v. *Zurich General Accident & Liability Ins. Co.*, 97 Misc. Rep. 360.

For these reasons I advise that the judgment and order appealed from be reversed and the complaint dismissed, but, as this phase of the case was not presented by the appellant, the reversal should be without costs.

CLARK and JAYCOX, JJ., concur.

Judgment and order reversed, without costs.

SAMUEL DAVIDOFF, Respondent, *v.* MEYER CHIPORNOI and DAVID CHIPORNOI, Appellants.

(Supreme Court, Appellate Term, Second Department, September, 1917.)

Attachment — return of marshal as to levy made under warrant of — executions — judgments — appeal — Municipal Court Code, §§ 129(1), 154.

Statutes — construction of — Municipal Court Code, § 181.

Where the return of a marshal as to the levy, made under the warrant of attachment granted in a Municipal Court action, after stating that he had attached and taken into his custody certain property of defendants, further states that the premises where said property was were locked up and that he was unable to obtain admission, there is no valid levy, and subse-

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quent proceedings for constructive service of the summons taken in attempted compliance with section 83 of the Municipal Court Act, then in force, were void, and the judgment thereafter entered was unauthorized and void.

Even had the attachment been duly levied and the judgment valid, an execution against the wages of the defendants was unauthorized because the judgment, by virtue of section 91 of the Municipal Court Act, was not enforcible by execution against any other property of defendants, except only such as was actually levied upon.

Under section 154(5) of the Municipal Court Code an order denying defendants' motion to vacate and set aside the execution issued against their wages and to vacate and set aside the judgment entered against them, is appealable so far as it relates to the judgment, but under section 155 of said Code no appeal lies from an order entered on a motion to vacate an execution separate from an appeal from the judgment.

The judgment having been rendered without due service of process, defendants under section 253 of the Municipal Court Act, then in force, might move to open their default and have the case set down for pleading or trial, or, under sections 310 and 311 of said act, take an appeal from the judgment, but the new remedy provided by sections 129(1) and 154 of the Municipal Court Code which do away with the former forms of proceeding and substitute a motion to vacate the judgment and for an appeal from an order granting or denying such motion, was available to defendants whether the judgment was rendered before or after September 1, 1915, when the Municipal Court Code took effect.

The rule that a statute will not be construed to have a retrospective effect unless the language clearly so requires is not applicable to statutes which only regulate procedure or affect the remedy, and the new procedure is not rendered unavailable by the general provision of section 181 of the Municipal Court Code that it shall not be retroactive.

APPEAL from an order of the Municipal Court, borough of Brooklyn, third district, denying defendants' motion to vacate and set aside an execution and to vacate and set aside a judgment against them rendered on November 29, 1913.

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Abraham Miles, for appellants.

Henry D. Levy, for respondent.

BENEDICT, J. This is an appeal by defendants from an order of the Municipal Court, borough of Brooklyn, third district, dated July 26, 1917, denying defendants' motion to vacate and set aside an execution issued June 22, 1917, against their wages and earnings, and to vacate and set aside the judgment entered against them on November 29, 1913.

The summons was issued on November 14, 1913, and at the same time a warrant of attachment was granted against the property of the defendants. The proceedings of the marshal thereunder appear by his return, dated November 19, 1913. It is evident from this return that he never made any lawful levy of the attachment, because he did not take the property on which he attempted to levy, and which was capable of manual delivery, into his actual custody, as required by section 78 of the Municipal Court Act as then in force. See *Johnson* v. *Kalisak,* 90 Misc. Rep. 597; *Anthony* v. *Wood,* 96 N. Y. 180, 186, 187; *Robinson* v. *Columbia Spinning Co.,* 23 App. Div. 499, 502; 31 id. 238, 241; *Fiske* v. *Parke,* 77 id. 422. The obstacle in the way of taking actual custody of a note in *Hardon* v. *Dixon,* 91 App. Div. 109, was a legal obstacle, not a physical obstacle. The return states that the premises where the property was were locked up, and that the marshal was unable to obtain admission; and this statement overcomes the previous statement that he had attached and taken into his custody the property in question.

After making this ineffectual levy, the marshal proceeded to make constructive service of the summons, attachment and inventory on the defendants in an attempted compliance with the provisions of section 83 of the Municipal Court Act, as then in force.

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Section 91 of the act as then in force provided that: "Where the defendant has not appeared, and the summons has not been personally served upon him, and property of the defendant has been duly attached by virtue of a warrant which has not been vacated, the court must proceed to hear and determine the action; but in an action subsequently brought, the judgment is only presumptive evidence of the indebtedness. * * * The execution, issued upon a judgment so rendered, must require the marshal to satisfy it out of the property so attached, without containing a direction to satisfy it out of any other property."

It is clear that the procedure provided for in sections 83 and 91 is in the nature of procedure *in rem*. Before the court is authorized under such a condition to adjudicate upon the plaintiff's claim, it must have in its actual custody and power through its marshal some property of the defendant against which its execution can be issued and enforced. *Pennoyer* v. *Neff*, 95 U. S. 714, 727, 728. In the case at bar the property attempted to be levied on was never in the actual custody and power of the court, so that it could be sold under its execution. As there was no valid levy of the attachment, the subsequent proceedings for constructive service of the summons, taken in attempted compliance with section 83 of the Municipal Court Act, were void, and there was no valid service of the summons. The judgment was rendered without due service of process and was, therefore, unauthorized and void. See *Dixon* v. *Carrucci*, 49 Misc. Rep. 222.

Had the judgment been valid — that is, had the attachment been duly levied — I would still say that the execution against the wages and earnings of the defendants was unauthorized, because the judgment was not enforcible by execution against any other property of defendants, except only such as was act-

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ually and lawfully levied upon. Mun. Ct. Act, § 91, quoted *supra*. The case cited by the respondent (*Matter of Cotton*, 55 Misc. Rep. 321) is not applicable, because there the service of the summons was pursuant to sections 32 to 34 of the Municipal Court Act, by the last of which sections substituted service pursuant to an order of the court made in the manner authorized is in effect declared equivalent to personal service, except that an execution against the person is not to issue upon a judgment rendered on such substituted service. Obviously section 91, above quoted, did not apply to a judgment rendered on the form of service authorized by sections 32 to 34.

The next question relates to the appealability of the order. I think it is appealable so far as it denies the motion to vacate the judgment under section 154, subdivision 5, of the present Municipal Court Code; but there seems to be no provision for an appeal from an order granting or denying a motion to vacate an execution separate from an appeal from a judgment. See Mun. Ct. Code, § 155.

The question remains whether the Municipal Court has power to vacate the judgment, because the summons was not properly served. Under the present Code there would seem to be no question that the power and the duty exist to vacate a judgment rendered without due service of process. Mun. Ct. Code, § 129, subd. 1. The Municipal Court Act, as in force when the judgment in question was rendered, afforded two remedies to a defendant who had not appeared in an action to obtain relief against a judgment rendered against him without due service of process. One remedy was by motion to open his "default" and have the case set down for pleading, hearing or trial under section 253. *Friedberger* v. *Stulpnagel*, 59 Misc. Rep. 498; *Roberts & Lewis Co.* v. *Dale*, 74 id. 390;

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Heinzer v. *Kretz,* 91 id. 58; the latter two cases holding that upon such motion the court might order a trial of a traverse to the jurisdiction. The other remedy was by appeal. Mun. Ct. Act, §§ 310, 311; *Friedberger* v. *Stulpnagel, supra,* 499; *Dixon* v. *Carrucci,* 49 Misc. Rep. 222, 225; *Gottlieb* v. *Kurlander,* 52 id. 89, 92; *Altieri* v. *Trotta,* 53 id. 649; *Canelli Wine Co.* v. *Tassi,* 88 id. 573. The present Code does away with both of these anomalous forms of procedure, and substitutes therefor a motion in the Municipal Court to vacate the judgment, and an appeal from an order granting or denying such a motion. Mun. Ct. Code, § 129, subd. 1; Id. § 154. This was obviously merely a change in the form of the remedy, and the new procedure is therefore available whether the judgment was rendered before or after the taking effect of the Municipal Court Code (September 1, 1915). The rule that a statute will not be construed to have a retrospective effect, unless the language clearly requires such a construction, is not applicable to statutes which only regulate procedure or affect the remedy. *Holmes* v. *Camp,* 219 N. Y. 359, 372; *Jacobus* v. *Colegate,* 217 id. 235, 240; *Laird* v. *Carton,* 196 id. 169, 171. Nor are we prevented from holding the new procedure available by the general provision of section 181 that the Code shall not be retroactive. This section reads: "This act shall not be retroactive nor shall it create a vacancy in any office or employment." I regard this as meaning that the act shall not be deemed in any manner to destroy or wipe out any existing right, nor to create a right not previously existing with respect to past transactions. It does not mean, in my opinion, that the old forms of remedy must be pursued to secure or enforce rights existing when the new Code took effect. We have here a judgment which was absolutely void. Certain remedies existed under the old act by which its

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invalidity might have been made matter of record, and those remedies continued to exist down to the time the new Code took effect. Does the provision that the new Code shall not be retroactive require that those precise remedies, rather than the new remedy designed to accomplish the same result, shall be pursued now with respect to such judgment? I think not. I am aware that in so holding I disagree with the conclusion of the Appellate Term, first department, as expressed in *Gaynor* v. *Yier*, 97 Misc. Rep. 662; but the construction given to the word "retroactive" in that case was, as it seems to me, too broad. *Gold* v. *Langfelder & Son, Inc.*, 93 Misc. Rep. 508, involved a very different question. Nor do sections 93 and 94 of the General Construction Law require that the old remedies shall be pursued. *Leake* v. *Hartman*, 137 App. Div. 451; affd., 202 N. Y. 605.

At the time when the Municipal Court Code took effect the right to appeal from the judgment in the case at bar was, so far as appears, still open, as there is nothing to show that notice of the entry of such judgment had been served on the defendants or either of them. Mun. Ct. Act, § 311. The present Code places no time limit upon the right to employ the substituted procedure by motion in the Municipal Court. Mun. Ct. Code, § 129, subd. 1.

The result is that the order appealed from, in so far as it denies the motion to vacate the judgment, should be reversed, without costs, and the action remitted to the Municipal Court with directions to grant the motion, with ten dollars costs, and that the appeal from so much of the order as denies defendants' motion to vacate and set aside the execution should be dismissed.

CLARK and JAYCOX, JJ., concur.

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Order in so far as it denies motion to vacate judgment reversed, without costs, and appeal from so much of order as denies defendants' motion to vacate and set aside execution dismissed.

MARIE ROBIN, Respondent, *v.* ARBEL F. COLAIZZI and MARY C. COLAIZZI, Administrators with the Will Annexed of DOMINICK L. COLAIZZI, Appellants.

(Supreme Court, Appellate Term, Second Department, September, 1917.)

Bailment — restaurant keepers — bailor and bailee — judgments.

The plaintiff visited a restaurant kept by defendants' intestate and handed to her escort her pocketbook which had in it a sum of money and a diamond ring. He put it in his overcoat pocket and checked the coat in the coat room and when later, on request, the coat was returned to him the pocketbook was gone. *Held,* that in the circumstances defendants' intestate did not become the bailee of the pocketbook, was not liable for its loss and that a judgment in favor of plaintiff should be reversed and the complaint dismissed.

APPEAL by defendants from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, first district, in favor of the plaintiff and against the defendants, rendered on the 28th day of February, 1917.

Frank H. Reuman, for appellants.

Frederick W. Hamberg, for respondent.

JAYCOX, J. The action was brought to recover the value of a pocketbook and its contents, lost in the restaurant of the defendants' intestate under the following circumstances which are undisputed and are con-

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tained in a statement made by the plaintiff's attorney at the opening of the trial: "The plaintiff visited the defendant's restaurant with an escort and she handed her pocketbook which had in it eleven dollars in bills and her diamond ring to her escort and her escort put the pocketbook in his pocket and checked his overcoat in the coat room; when he later asked for his coat, the coat was returned to him and the pocketbook was gone."

The question involved in this case is, under the circumstances here disclosed, did the defendants' intestate become the bailee of the lost pocketbook and its contents?

None of the cases upon the subject relied upon by the plaintiff hold the defendant in such an action liable as bailee, unless he knew the lost article was in his possession or unless the article which he did receive was of such a character that the presence of the lost article or articles of a similar nature might be presumed. The first case cited by plaintiff to sustain her recovery is *Hasbrouck* v. *New York Central & Hudson R. R. R. Co.*, 202 N. Y. 363. The lost articles in that case were some clothing and jewelry and twenty-five dollars in money that were contained in a suit case which the plaintiff carried with her upon the train of the defendant. The court said, at page 377: "The plaintiff took the articles in question with her for personal use at a reception to be held at the end of her journey and a small amount of money for use in case of emergency. The jewelry was adapted to her tastes, habits and standing, as the court found upon sufficient evidence, and the amount of money was no greater than was found to be reasonable and prudent." The delivery of the suit case was implied notice that it contained such articles as might appropriately be carried as hand baggage. The court having found that the articles in

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question were appropriate articles to be carried in that manner, the defendant upon receipt of the suit case became liable for its contents. In *Delmour* v. *Forsythe,* 128 N. Y. Supp. 649, the watch in question was placed on a table at the request of and in the presence of a clerk of the defendant. The defendant was held to be a bailee and charged with the duty of exercising some care. *Appleton* v. *Welch,* 20 Misc. Rep. 343, was to recover for hats and coats delivered to a waiter and which were lost while thus in the defendant's custody. *Buttman* v. *Dennett,* 9 Misc. Rep. 462, was for articles of wearing apparel placed in the custody of the defendant for safe keeping. These are all cases cited by the plaintiff as supporting her position.

The case most nearly analogous to this case is *Nathan* v. *Woolverton,* 69 Misc. Rep. 425; affd. on opinion below, 147 App. Div. 908. In that case a passenger upon a railway checked his trunk without notice that it contained anything but ordinary personal baggage, though the trunk in fact contained merchandise of very large value, and it was there held, so far as the jewelry in the trunk was concerned, there was no contract as to it and the defendant had no knowledge it was in its possession. This being so the plaintiff had no cause for action.

The following cases all arise out of facts similar to those involved in the instant case and illustrate the same principle as *Nathan* v. *Woolverton, supra; Feder* v. *Simon,* 157 N. Y. Supp. 895; *Barnes* v. *Stern Bros.,* 89 Misc. Rep. 385; *Schleef* v. *Foodcraft & Co.,* 155 N. Y. Supp. 209; *Powers* v. *O'Neill,* 89 Hun, 129; *Warmser* v. *Browning, King & Co.,* 187 N. Y. 87, revg. 109 App. Div. 53; *Montgomery* v. *Ladjing,* 30 Misc. Rep. 92; *Pattison* v. *Hammerstein,* 17 id. 375; *Wentworth* v. *Riggs,* 159 App. Div. 899, revg. 79 Misc. Rep. 400.

The judgment should be reversed and as it is appar-

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ent that the facts could not be changed upon a new trial the complaint should be dismissed, with costs.

Judgment reversed, with thirty dollars costs, and the complaint dismissed, with appropriate costs in the court below.

CLARK and BENEDICT, JJ., concur.

Judgment reversed, with costs.

GRACE DEAN, Respondent, *v.* CARL BAUER and FREDERICK BAUER, Appellants.

(Supreme Court, Appellate Term, Second Department, September, 1917.)

Jurisdiction — of Municipal Court of city of New York — contracts — sales — trial — appeal — Municipal Court Code, §§ 70, 73.

The Municipal Court of the city of New York has jurisdiction of an action to recover the sum of $285, paid by plaintiff under a contract for the conditional sale of a piano alleged to have been retaken by defendants from plaintiff in violation of section 65 of the Personal Property Law.

Where defendants admit the contract, the amount paid and the retaking, but claim that the retaking was pursuant to an agreement for the rescission of the contract of sale or of a modification thereof, the decision of the trial court upon the question whether plaintiff consented to the retaking will not be disturbed on appeal.

There is nothing in section 70 of the Municipal Court Code which in any way restricts or extends the jurisdiction of said court and section 73 of said Code has no application to the present action, which is neither for conversion nor in replevin.

APPEAL by defendants from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, sixth district, in favor of the plaintiff and against the defendants.

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Samuel Weinstein, for appellants.

Frank W. Harris, for respondent.

JAYCOX, J. The action was brought to recover the sum of $285, the amount alleged to have been paid by the plaintiff, pursuant to a conditional sale of a piano, by reason of the alleged unlawful retaking of said piano by the defendants from the plaintiff, in violation of section 65 of the Personal Property Law.

The defendants admit the contract; admit the amount paid and also the retaking, but they claim that the retaking was pursuant to an agreement for the rescission of the contract of sale or the modification of the original contract. They also claim that the Municipal Court has no jurisdiction of an action under section 65 of the Personal Property Law.

The question as to whether the retaking was with the consent of the plaintiff or not has been passed upon by the court below and its decision should not be disturbed. Perhaps this court might have reached a different conclusion in the case had the case been tried before it originally, but the court below had the advantage of seeing the witnesses, and this is a great advantage and should not be lost sight of by us. The Appellate Division of this department decided in *Seabott* v. *Wanamaker,* 164 App. Div. 531, that the Municipal Court had no jurisdiction of an action under section 65 of the Personal Property Law. Since then, the Municipal Court Code has been adopted, and the question is as to whether it now has such jurisdiction. Section 6 of the Municipal Court Code gives the court jurisdiction when the amount claimed does not exceed $1,000, exclusive of interest and costs, of an action upon a contract, express or implied, other than the contract to marry. In *Seabott* v. *Wanamaker, supra,* it was

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decided that an action of this character is an action upon a contract and that under section 139 of the Municipal Court Act the court had no jurisdiction of the action. That section provided that no action shall be maintained in this court which arises on a contract of conditional sale of personal property. This provision has now been omitted. It is, however, claimed that the court has no jurisdiction of such an action by reason of the provisions of sections 70 and 73 of the Municipal Court Code. Section 70 reads as follows:

"Section 70. *What deemed lien on chattel.* For the purpose of this article a chattel mortgage to secure the purchase price of chattels as well as a contract of conditional sale of personal property and a hiring of personal property, where title is not to vest in the person hiring until payment of a certain sum, shall be deemed a lien upon a chattel; and an action to foreclose such a lien may be maintained."

I see nothing in this which in any way restricts or extends the jurisdiction of the Municipal Court. It merely defines a lien for the purpose of the article in which the section is found. The other section read as follows:

" Section 73. *When other actions not maintainable.* No action of conversion or replevin arising on an instrument mentioned in section 70 shall be maintained against the conditional vendee, lessee or mortgagor."

This is not an action of conversion or replevin, and therefore section 73 has no application to it. My opinion is that the court has jurisdiction of the action, and the judgment should be affirmed.

The appellant cites one case in which apparently the Appellate Term of the first department says that there has been no change in the practice. That case is *Cabello* v. *Harburger,* 95 Misc. Rep. 227. The action was for conversion, and under the section just quoted

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above there has been no change in the practice as to such an action and the Municipal Court has no jurisdiction thereof.

The judgment should be affirmed, with twenty-five dollars costs.

CLARK and BENEDICT, JJ., concur.

Judgment affirmed, with costs.

ORESTES DE MARTINI et al., Plaintiffs, *v.* JOSEPH MCCALDIN, Defendant.

(Supreme Court, New York Special Term, October, 1917.)

Corporations — receivers — jurisdiction — pleading — accounting — actions — General Corporation Law, § 35.

Under section 35 of the General Corporation Law the title to the assets of a corporation upon its dissolution vests in the directors as trustees for the creditors and stockholders unless other persons shall be appointed by the legislature, or by some court of competent jurisdiction.

Where no directors are to be found, the duty to collect and administer the assets of such a corporation devolves upon a receiver to be appointed, but no cause of action to reach assets in the hands of a third party vests in the stockholders.

A complaint by the stockholders of a corporation for an accounting by defendant of property of the corporation, of which he was not a director, which came into his hands after its dissolution by expiration of its charter, alleging that defendant received said property from two directors now deceased who were in possession at the time of said dissolution, with full knowledge that it represented corporate assets, and, further, that there are no creditors of the corporation and that the directors took no steps toward the settlement of its affairs and the division of its assets, and there are no allegations to support the case as one prosecuted in behalf of the corporation or of a receiver in its behalf, is subject to demurrer upon

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the ground that it is insufficient in substance, and also upon the further ground that there is a defect of parties defendant, there being none before the court who may assert legal title to the property in suit.

The question whether there are debts of the corporation to be paid cannot be determined as an issue between the stockholders and the defendant in the present action, as, until the statutory requirements for the ascertainment of the claims of creditors are met, there can be no administration of the assets upon the theory that the stockholders are entitled to the property. Therefore, the allegation that there are no creditors of the corporation, admitted by the demurrer to the complaint, cannot aid the plaintiffs. The cause of action resides in a receiver who must first be appointed to assert and to protect the rights of all persons, whether creditors or stockholders, who may have an interest in the distribution of the property when recovered from the defendant.

ISSUES of law upon demurrer to complaint.

John B. Doyle, for plaintiffs.

Leroy W. Ross, for defendant.

ERLANGER, J. The plaintiffs, stockholders of the American Ballast Log Company, seek an accounting by the defendant of property of the corporation which came into his hands after its dissolution through the expiration of time fixed by its charter. This defendant was not a director of the corporation, but it is alleged that he received the property from the two directors, now deceased, who were in possession at the time of the dissolution, with full knowledge that it represented corporate assets. The complaint further alleges that there are no creditors of the dissolved corporation and that the directors took no steps toward the settlement of its affairs and the division of its assets.

In my opinion, the case sought to be presented is defective for the reason that there is no party before

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the court who may assert legal title to the property in suit. Upon dissolution of a corporation, title to the assets vests in the directors, as trustees for the creditors and stockholders "unless other persons shall be appointed by the legislature, or by some court of competent jurisdiction." Gen. Corp. Law, § 35, formerly § 30, as amd. by Laws of 1892, chap. 687. In the present situation, where no directors are to be found, the duty to collect and administer the assets would devolve upon a receiver to be appointed, but no cause of action to reach assets in the hands of a third party vests in the stockholders. *Michel* v. *Betz*, 108 App. Div. 241. Whether or not there are debts of the corporation to be paid, is a question which cannot be determined as an issue between the stockholders and the defendant in this action. The ascertainment of the claims of creditors is regulated by statute, and, until the statutory requirements are met, the assets may not be administered upon the theory that the stockholders are entitled to the property. Therefore the allegation that there are no creditors of the corporation, as admitted by the demurrer, affords no aid to the plaintiffs. The cause of action resides in a receiver who must first be appointed to assert and protect the rights of all persons, whether creditors or stockholders, who may have an interest in the distribution of the property when recovered from the defendant.

Doubtless, if the defendant were a surviving director of the corporation, the plaintiffs would have a case. Such was the ruling made by the Appellate Division, upon appeal from an order, obtained by the plaintiffs, for an examination in aid of the framing of a complaint. *De Martini* v. *McCaldin*, 176 App. Div. 541. The plaintiffs' papers upon that application set forth that the defendant was the sole surviving director. As such, of course, he would have been in possession as

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trustee pursuant to the statute, and an action could be maintained for his removal and for an accounting to a receiver at the instance of the plaintiffs as *cestuis que trustent*. But it now appears from the complaint that he never was a director, and the necessity for the appointment of a receiver to bring the action, as the representative of the legal title, is apparent.

I must hold, therefore, that the complaint is insufficient in substance, since no right of action in the plaintiffs is exhibited and there are no allegations to support the case as one prosecuted by the plaintiffs in behalf of the corporation, or by a receiver acting in its behalf. The point is also presented by the demurrer upon the ground of a defect of parties defendant. In other respects, the demurrer must be overruled. The question discussed does not affect the jurisdiction of the court to entertain an action for an accounting, nor the legal capacity of the plaintiffs, as individual suitors, to present their grievance, and it is apparent, also, that there is no attempt to plead more than one cause of action.

Demurrer sustained, with costs, upon the ground that the complaint is insufficient in substance and upon the ground of a defect of parties defendant, with leave to plaintiffs to amend upon payment of costs within twenty days. In other respects demurrer overruled.

Ordered accordingly.

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In the Matter of the General Assignment for the Benefit of Creditors of ADOLPH VIETOR, Doing Business as FRED'K. PROBST & Co., to JOSEPH M. PROSKAUER, Assignee.

(Supreme Court, New York Special Term, October, 1917.)

Assignment for benefit of creditors — filing of — creditors' claims — duties of assignee — accounting — Laws 1909, chap. 17; Laws 1914, chap. 360, § 15(7, 8).

Where a general assignment for the benefit of creditors was filed in the proper county clerk's office on November 11, 1914, at 1:28 P. M. the filing of a creditor's claim with the attorneys for the assignee in the forenoon of November 11, 1915, is timely.

Section 15(7) of chapter 360 of the Laws of 1914, amending the Debtor and Creditor Law (Laws of 1909, chap. 17), and which declares that the court upon the final settlement of an insolvent debtor's estate shall have power to direct the assignee to "pay to the lawful creditors their proportionate dividend notwithstanding their claim has not been presented in accordance with the notice sent out by the assignee, provided one year has not elapsed since the filing of the general assignment," limits the power of the court to exonerate a creditor from the consequences of his failure to present his claim in accordance with such notice, to a period of one year after the filing of the general assignment, and a claim not filed until after the expiration of a full year is lost.

The court, however, has the power and it is also its duty to treat formal verified proofs of claim filed by creditors after the expiration of the prescribed time limit as amendments of unverified proofs of claim previously filed.

Under section 15(8) of chapter 360 of the Laws of 1914, giving the court power to allow secured creditors "such sum only as to the court seems to be owing over and above the value of their securities," a creditor bank which since the making of a general assignment for the benefit of creditors has realized on collateral security held by it will be allowed a dividend only upon the balance of its claim.

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MOTION by an assignee for the benefit of creditors for an order allowing certain claims and for instructions as to other claims.

Rosenberg & Ball, for assignee and motion.

Satterlee, Canfield & Stone (Karl T. Frederick and Cornelius Hearn, Jr., of counsel), for Bank of New York, claimant.

Whitridge, Butler & Rice (Edwin T. Rice, of counsel), for Arbuthnot, Latham & Company, Banque Belge Pour l'Etranger, Conrad Hinrich Donner and the Standard Bank of South Africa, Limited, claimants.

Gregory, Stewart & Wrenn, for Estates of Frank Muller and Carl W. Volckman, claimant.

Rudd, Wood & Molloy, for Calixto Romero, claimant.

Arthur A. Michell, for Tabucalere Mexicana anonima, claimant.

GIEGERICH, J. The assignee for the benefit of creditors by this motion seeks an order providing for the allowance by him of certain claims presented against the assigned estate and for instructions respecting certain other claims, some of which were not filed until a year after the filing of the general assignment and one of which is partially secured. The application is made pursuant to section 14 of chapter 360 of the Laws of 1914, which provides that: "It shall be the duty of the assignee to * * * report promptly to the court any claims presented to him which are not provable, or are incorrect or false and shall also report

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promptly for allowance all claims presented to him which are not disputed; * * * pay dividends as often as is compatible with the best interests of the estate," and also pursuant to subdivision 1 of section 15 of the same enactment, which prescribes that: "The court shall have power to allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against the estate." Questions are raised with respect to thirteen of the claims enumerated in schedule A. The assignee states that these thirteen claims were not filed with the assignee within one year from the date of the assignment. Subdivision 7 of section 15 of chapter 360 of the Laws of 1914 provides as follows: "The court shall have power * * * 7. To direct upon the final settlement of the estate that the assignee pay to the lawful creditors their proportionate dividend notwithsanding their claim has not been presented in accordance with the notice sent out by the assignee, provided one year has not elapsed since the filing of the general assignment." It appears from the New York county clerk's file mark stamped upon the general assignment that it was filed on November 11, 1914, at one twenty-eight P. M. On July 9, 1915, an order was made by this court authorizing the assignee to publish notice to creditors to present to him their respective duly verified claims against the assigned estate wherein the time for filing or presentation of such claims was limited to the 15th day of September, 1915. Of the thirteen claims which, according to the petition of the assignee, were not presented to him within the prescribed period of one year from the date of the assignment, one, that of Calixto Romero, was, according to the uncontradicted statements contained in the affidavit of the employee of the attorneys in fact for that claimant, filed with the attorneys for the assignee in the forenoon of November 11,

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1915. As the general assignment was not filed until one twenty-eight P. M. on the 11th day of November, 1914, it would seem clear that the claim in question was filed within the year and should be allowed. This leaves for consideration the twelve claims which concededly were not filed until after the expiration of a full year. Under the law of this state as it existed under our former Assignment Act (Laws of 1877, chap. 466, with various amendments thereto) there was no such period of limitation of one year, nor any fixed period of limitation for the proof and allowance of claims. The power conferred upon the court by section 20 of that act "to decree payment of any creditor's just proportional part of the fund" had no limitation of time imposed upon it by the act. As was said in *Matter of Bowlby*, 34 Misc. Rep. 311, 318, 319, the court at the time speaking more particularly of the effect of section 19 of the former Assignment Act permitting any person claiming an interest, although not served, to appear on the return of the citation and become a party, on duly presenting his claim, "* * * at any time before final judgment, and even before the distribution of the fund, creditors may be permitted to come in and file their claims (Bish. Insolv. Debt. [3d ed.] sec. 441, p. 548, and cases cited) upon the term and condition necessitated by the circumstances of the particular case (3 Wait Pr. 364)," and a like wide liberty to creditors to come in and prove their debts at any time before the actual distribution of the fund was permitted by the law as it existed prior to the Assignment Act of 1877. *Wilder* v. *Keeler*, 3 Paige, 164; *Brooks* v. *Gibbons*, 4 id. 373; *Pratt* v. *Rathbun*, 7 id. 269. Under our present insolvent act, however, being Debtor and Creditor Law, chapter 17, Laws of 1909, as amended by chapter 360 of the Laws of 1914, section 15, subdivision 7, provides

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as follows: "Section 15. *Power of Court.*— The court shall have power: * * * 7. To direct upon the final settlement of the estate that the assignee pay to the lawful creditors their proportionate dividend notwithstanding their claim has not been presented in accordance with the notice sent out by the assignee, provided one year has not elapsed since the filing of the general assignment." I am clearly of the opinion that this section limits the power of the court to exonerate a creditor from the consequences of his failure to present his claim in accordance with the notice sent out by the assignee to a period of one year after the filing of the general assignment. In other words, if the creditor has failed to present his claim in accordance with such notice, and one year has expired after the filing of the general assignment, his claim is lost. Although I have not been able to find any reported case under our present law discussing this point, light is thrown upon the question by numerous adjudications in the federal courts. In *Matter of Bimberg,* 121 Fed. Repr. 942, 943, the court said: "The language of section 57n is that 'claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication.' The authorities hold that this language is more than a limitation of time, and is an absolute prohibition. (*Bray* v. *Cobb,* D. C., 100 Fed. 272; *Re Shaffer,* D. C., 104 Fed. 982; *Re Moebius,* D. C., 116 Fed. 47; Collier on Bank., 4th ed., p. 394). The moving creditor, therefore, if the discharge were vacated, could not share in any dividend." All the greater weight ought to be given to these decisions in the United States courts, although based upon statutory language not identical in terms with the language of our own statute, because of the manifest and wise purpose of our legislature to assimilate our state law to the federal law in the matter of the administration of the estates of insolvent

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and bankrupt debtors. I therefore feel constrained to disallow the claims of the following eight creditors: Ruben R. Barrientos, Louis Delius & Co., Henkel & Co., Sucs. S. en C., La Tabacalera Mexicana, Melchers, Successors, Julio Normand, Gebruder Oettling, Wallace D. Barkley, Inc. This leaves for consideration the claims of four creditors, namely, Arbuthnot, Latham & Co., $56,690.54; Banque Belge Pour l'Etranger, $25,028.79; Conrad Hinrich Donner, $35,824.09; Standard Bank of South Africa, Lim., $2,509.62. With respect to the four claims just enumerated, the facts are as follows: On the day following the assignment the attorneys for Arbuthnot, Latham & Co. and the Standard Bank of South Africa, Lim., served notice upon the assignee on behalf of each of the two creditors just named, there being attached to such notices copies of the trust receipts executed by the assignor giving the amounts and maturities of the drafts drawn upon the letters of credit and showing substantially the amounts respectively due to the two creditors. Furthermore, the claims of these two creditors were, immediately after the making of the assignment, brought to the notice of the assignee and his accountants and were checked up with the entries upon the assignor's books relating to such indebtedness. The claims of the Banque Belge Pour l'Etranger and Conrad Hinrich Donner were also presented to the assignee in the month following the date of the assignment, with statements of account showing the net indebtedness and the particulars thereof in accordance with the books of the assignor, and correspondence was had between the attorneys of the two creditors last named and the assignee concerning such claims during the three months immediately following the assignment. No properly verified proofs of claim of any of the foregoing four claims were filed with the

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assignee, however, within one year after the filing of the assignment; but after the lapse of such year properly verified proofs of claim were filed at varying dates in each instance. The question for determination with respect to these four claims is whether the more or less informal method of presenting the claims without verification within the year is a sufficient foundation to support an act of the court in allowing the subsequent formal proofs to be received as amendments of the earlier and insufficient notices. Upon this point also great help is found in the decisions of the United States courts. In *Matter of Kessler,* 184 Fed. Repr. 51, 53, the court said: " It has been repeatedly held that a ' proof of claim ' which is defective in some substantial particular may be amended, and that such amendment may be made subsequent to the expiration of one year after adjudication, although the effect of such amendment may be that ' proof of claim ' is thereby effectively made only after the year limited by section 57n (Act July 1, 1898, c. 541, 30 Stat., 561, U. S. Comp. St., 1901, p. 3444). The great liberality of the courts in that regard is shown by an analysis of some of the decided cases. In *Hutchinson* v. *Otis* (First Circuit, 8 Am. Bankr. Rep., 382, 115 Fed., 937, 53 C. C. A., 419) there had been filed within the year ' a proof which failed in very substantial particulars ' to comply with the general orders. Subsequently, after expiration of the year, the creditors were allowed to file a substituted proof of claim. This course was approved, the court saying: ' Courts of bankruptcy, like courts of admiralty, permit amendments with a most liberal hand; and as there was enough in the original proof by which to amend, and as the District Court thought it was equitable to allow the amendment, the appeal cannot be maintained.' This decision was affirmed in the Supreme Court (*Hutchinson* v. *Otis,* 190 U. S., 552, 23 Sup. Ct., 778, 47 L. Ed., 1179).

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In a case before this court (*In re Roeber*, 127 Fed. 122, 62 C. C. A., 122) the District Judge had, subsequent to the year, allowed an alleged proof of claim to be amended. It was inartificially drawn, but contained averments that there was due and owing to creditors a stated sum, for materials furnished to the bankrupt in the erection of a building, and that a certain sum of money was security therefor. It was not signed by the creditor, nor was it verified, nor did it contain any statement of payments. The amendment supplied these defects, and we affirmed the District Judge, saying: 'Bankruptcy courts have the usual powers of courts of justice, upon motion and for good cause to allow amendments. All parties were advised of the claim within the year. There is no dispute that the amount claimed is justly owing from the bankrupt. The amendment was in furtherance of justice and within the legitimate exercise of a power of amendment.'" The court further said in differing from the view of the judge below: "We do not concur with the conclusion that it (referring to the written statement filed with the assignee) did not contain in writing any indication that it is a claim against the bankrupt estate. It was not sent until after assignment, and was expressly sent, not to Kessler & Co., but to the assignee as a claim against their estate. It did not contain any statement in reference to security, nor was it verified, nor was it in the form prescribed; but it certainly notified the assignee and, when it was by him turned over to the receiver, notified the latter that Heine & Co. claimed that the estate of Kessler & Co. owed the stated sum of money as a result of transactions therein set forth." So, too, in *Hutchinson* v. *Otis*, 190 U. S. 552, 555, the court said: "The proof of debt originally filed is admitted to have been defective. A substituted proof was filed by consent of the trustee more than a year after the adjudication, the facts

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having been agreed upon in the meantime and an appeal taken. It is argued that the allowance of the amendment is within section 57n forbidding proofs subsequent to one year after the adjudication, etc. The construction contended for is too narrow. The claim upon which the original proof was made is the same as that ultimately proved. The clause relied upon cannot be taken to exclude amendments. An example similar in principle is the allowance of an amendment setting up the same cause of action after the statute of limitations has run, when the original declaration was bad (*Sanger* v. *Newton*, 134 Mass., 308)." I think it is plain without discussion that the principles enunciated in the foregoing extracts establish not only that the court in the present case has the power, but also that it is its duty to treat the formal verified proofs filed after the expiration of the prescribed year as amendments of the respective previous notices. These four claims are therefore allowed. So far as concerns the claim of Von Dinel, Rode & Co., which is not mentioned in either of the schedules annexed to the petition of the assignee, I am of the opinion that it should be disallowed, for the reason that it was not presented within the statutory period nor have these claimants presented such facts as would bring their claim within the rule as to amendments above set forth. No objection has been made to any of the claims enumerated in schedules B and C, and they are therefore allowed for the respective amounts recommended for allowance by the assignee, as are all other claims enumerated in schedule A in respect to which no question has been raised. One question alone remains, and that relates to the extent to which the secured creditor, the Bank of New York, shall be allowed to participate in the fund in the hands of the assignee. The creditor has a claim amounting to $133,030.23 and had in its possession collateral security for the payment of the

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amount, on which collateral it has since the assignment realized the sum of $77,830.59, and there still remain three or four small items which have not been reduced to cash, but which are said to be long overdue drafts on foreign institutions where payment has been in part delayed by the war, the value of which is very doubtful. On behalf of this claimant it is argued that it should be permitted to have its dividend from the assignee upon its entire claim of $133,030.23, instead of upon the balance remaining of that claim after applying it upon the value of the collateral security. The assignee resists this theory and contends that the dividend should be allowed only upon the balance. My conclusion is in favor of the contention of the assignee. The argument on behalf of the claimant bank is based upon the decisions of courts of equity in this state, of which *People* v. *Remington & Sons*, 121 N. Y. 328, is a leading example, which hold that, upon principles of equity jurisprudence, the creditor in such a situation should have his dividend upon his entire claim, undiminished by the value of the collateral. The question in this state is now no longer left, however, to be determined upon principles of equity jurisprudence as laid down by the courts, but is governed by statute. The same statute above referred to (Laws of 1914, chap. 360, amending Laws of 1909, chap. 17) provides as follows: "Sec. 15. *Power of Court* — The court shall have power: * * * 8. To allow secured creditors such sum only as to the court seems to be owing over and above the value of their securities." This provision seems to be another instance where our legislature has sought to assimilate the insolvency act in our state to the Bankruptcy Law of the nation. Section 57e of the Bankruptcy Act provides as follows: "Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings of creditors' meetings held prior to the

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determination of the value of their securities or priorities, but shall be allowed such sums only as to the courts seem to be owing over and above the value of their securities or priorities." It may be conceded that the bankruptcy provision just quoted is more clearly worded than is our own statute on the point, because the latter on its surface seems to leave open the question whether the word "sum" refers to the sum of the claim which the secured creditor shall be allowed to prove or the sum of the dividend which he shall be allowed to receive. Upon consideration, however, it seems abundantly clear that it must have been the former meaning and not the latter which the legislature had in mind in adopting this statute. If it be held that the statute means what the claimant bank contends, namely, that a secured creditor shall not be allowed to receive from both sources, namely, the funds of the insolvent estate and the securities which he holds, more than the full amount due him, we thereby ascribe to the legislature the enactment of a meaningless provision. So far as I am aware, no decision nor any practice in the distribution of the estates of insolvent debtors ever provided for the payment to any creditor of any character, under any possible circumstances, of more than 100 per cent of the amount due him, and it is impossible for me to conceive any ground on which any one could make such a contention. It would have been wholly purposeless, therefore, for the legislature to declare that a thing should not be done which never had been done and which no one had ever argued should be done. But, on the other hand, there was a debated question whether a secured debtor should be allowed to prove his claim in the full amount thereof or only in the amount over and above the value of his securities. The courts of this state had taken a stand on this mooted question in favor of allowing proof of the full amount. The federal stat-

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ute of bankruptcy made the contrary provision and permitted the proof only of the excess. In such a situation the legislature of our state, in a statute assimilating our law in other respects to the federal law, spoke on this debated point, and I think it should be held that by the language used they intended to preclude creditors from proving the full amount of their debt, as they had theretofore been permitted to do, and thereafter to allow them to prove only the amount over and above the value of their securities. Before I can determine in what amount the creditor bank should be permitted to prove its claim, it will be necessary to have some more definite information as to the value of the securities not yet realized upon. Evidence of such value should be submitted within five days after the publication of this opinion. In all other respects the motion is disposed of as indicated.

Ordered accordingly.

Matter of the Petition of THOMAS E. RUSH to Grant Right to Inspection of Ballots Cast at Last Primary Election Held September 17, 1917.

(Supreme Court, New York Special Term, October, 1917.)

Election Law, § 88 — provision in case of contested nomination for office — primary elections — right to examine ballots.

The provision of section 88 of the Election Law that in the case of a contested nomination for office "any candidate shall be entitled as of right to an examination in person or by authorized agents of any primary ballots upon which his name lawfully appeared as that of a candidate" leaves nothing to the discretion of the court, and upon the claim of one who was a candidate for office at a primary election, that a recount would show that a majority of the votes were cast for him for justice of the Supreme Court in Manhattan and The Bronx, he is entitled as of right to such examination and the ballots are required to be preserved for thirty days for that purpose, and an application made before the expiration of the time limit must be granted.

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MOTION to inspect ballots cast at last primary election held September 17, 1917.

Raymond B. Stringham (Henry de Forest Baldwin, of counsel), for petitioner.

Herbert R. Limburg, for John V. McAvoy.

WHITAKER, J. Upon the foregoing papers this motion is granted. The petitioner, Thomas E. Rush, asks the court to grant him the right to inspect the ballots cast at the last primary election held on September 17, 1917, claiming that a recount will show that a majority of the votes were cast for him for justice of the Supreme Court in Manhattan and The Bronx. The returns tabulated by the board of elections show that 17,448 votes were cast for petitioner and 30,568 were cast for his opponent, John V. McAvoy. The board of elections claim, which claim is joined in by Judge McAvoy, that petitioner has forfeited his right to examine the ballots by reason of having delayed his application for three weeks and is guilty of *laches;* that the petition as to charge of irregularities is based only upon information and belief; that the petitioner is not the real party in interest, and that the proceeding is based upon ulterior motives. The board of elections, by the corporation counsel, strenuously oppose the granting of the inspection, for the reason that the petitioner has delayed his application so long that to grant it at this time would cause a "complete disruption of the election machinery." As to the right of petitioner to the relief sought, and the petitioner having forfeited his right by delay, section 88 of the Election Law provides as follows: "After the close of the canvass of the votes at official primary elections the ballots of each party cast thereat * * * shall be tied together, labeled and replaced in the ballot boxes from which they were respectively taken, and

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such ballot boxes shall then be securely locked and sealed and, together with the box containing the stubs, shall be returned to the officer from whom they were received, who shall safely keep the same, subject, however, to be produced upon the order of any court of record or judge thereof, for not less than thirty days after such primary election and until all suits or proceedings before any court or judge touching the same shall have been finally determined, when the ballots and stubs shall be removed and without examination destroyed. In the case of a contested nomination for office * * * any candidate shall be entitled as of right to an examination in person or by authorized agents of any primary ballots upon which his name lawfully appeared as that of a candidate; but the court shall prescribe such conditions, as of notice to other candidates or otherwise, as it shall deem to be necessary and proper." This provision of the statute leaves nothing to the discretion of the court. The "petitioner" is "entitled as of right" to an examination, and the ballots are required to be preserved for thirty days for that purpose. There is much force in Judge McAvoy's position that he would have gladly consented to an examination had the application been made in time, but petitioner having delayed his application he now feels that he should join with the board of elections in opposing it in order to prevent, as the board claims, a serious menace to the proper preparation for the election. The petitioner has, however, moved the court before the expiration of thirty days from the date of the primary election, and the court has no power to prescribe a shorter limitation. As to the claim that the petitioner is not the real party in interest and is moved by others whose motives are not based upon an honest belief that an inspection will change the result, but are based upon other and

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purely political motives, there is much in the application and surrounding circumstances that would justify the drawing of such an inference, but with that the court is not concerned. The court must construe the law as it is written and enforce it, even though it were conceded that those seeking its enforcement were moved by selfish ends and ulterior motives. While the board of elections may be very seriously inconvenienced, that of itself does not justify the court in disobeying the plain mandates of the statute, but inasmuch as the city will be put to a large expense by reason of granting the order the court will require the petitioner to deposit such cash sum as the board determines will be sufficient to pay the entire expenses the city may be put to. The order shall provide for notice to the candidates; that the inspectors of each election district meet and recount the votes in the presence of each of the candidates who desire to be present and in the presence of two representatives of each candidate; that the district attorney shall also be allowed to be present by a representative at such count; that during such count the candidates and the representatives may inspect and examine each ballot, and the order shall provide that the validity of all ballots to which either party objects shall be passed upon by the inspectors and kept separate in order that they may be produced before the court to subsequently pass upon; that the inspectors shall recount the votes and make return to the board of elections. The place where the examination shall be made shall be left to the board of elections. The order shall also provide the time when the count shall be completed by the inspectors and the return made to the board. This time may be fixed by the board of elections.

Ordered accordingly.

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Matter of the Application of WILLIAM HICKEY, of the Town of Kinderhook, for a Writ of Certiorari to the Commissioner of Excise of the State of New York and the County Treasurer of Columbia County.

Matter of the Application of ALFRED SNYDER, of the Town of Kinderhook, for a Writ of Certiorari to the Commissioner of Excise of the State of New York and the County Treasurer of Columbia County.

(Supreme Court, Albany Chambers, October, 1917.)

Liquor Tax Law — provisions of, for appointment of commission by town boards — villages — towns.

Certiorari — determination of local commission final — Laws of 1917, chap. 623, § 8.

Before the amendment of section 8 of the Liquor Tax Law by chapter 623 of the Laws of 1917, the town of Kinderhook, Columbia county, was entitled to and had sixteen certificated places for the sale of liquor to be drunk on the premises, four in Kinderhook village, seven in the village of Valatie and five in the outlying territory. Under said amendment, the commission appointed by the town board, to reduce the number of places in the town as "nearly as may be" in proportion to the number of places then trafficking in liquor, certified to two in the village of Kinderhook, three in the village of Valatie and one in the town outside of the said villages. The state commissioner of excise, after notifying the county treasurer of Columbia county not to issue any certificates for the town of Kinderhook, filed a designation of places which were to be allowed to traffic in liquors after October 1, 1917, one to the village of Kinderhook, three to the village of Valatie and two to the town outside of said villages. *Held*, that as under said section 8, as so amended, the determination of the local commission was final and conclusive, the designations by it being made before September 1, 1917, the application of a resident of the village of Kinderhook whom the state commissioner of excise had omitted from his designation and of a resident of the village of Valatie whom

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he had also omitted from his designation substituting for him the name of some other person, both of said applicants being designated by the local commission, that the county treasurer issue to each of said applicants a liquor tax certificate to traffic in liquors in places designated by the local commission will be granted.

APPLICATION for writ of certiorari.

Coffin & Coffin (Samuel B. Coffin, of counsel), for petitioner William Hickey.

J. Rider Cady, for petitioner Alfred Snyder.

Harry D. Sanders for state excise commissioner and for county treasurer of Columbia county.

RUDD, J. The applicants above named ask for a writ of certiorari directed to the state commissioner of excise and the county treasurer of Columbia county to review the action of the county treasurer in refusing to issue a liquor tax certificate to the applicants respectively.

The applicant Hickey is a resident of the village of Kinderhook, Columbia county, and the applicant Snyder is a resident of the village of Valatie in the same county.

Each petitioner has under the Liquor Tax Law for many years been engaged in the business of trafficking in liquors under a certificate duly issued authorizing him to traffic in liquors to be drunk upon the premises where sold.

The facts set forth in the petitions here under consideration are not controverted by the commissioner of excise of the state.

The counsel representing the state commissioner stated upon the argument of the question here

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involved that he believed the statement of facts set forth by the petitioners was correct.

It was also agreed in open court, between the counsel representing the state commissioner and the petitioners, that without the formality of the issuance of a writ of certiorari this court might determine the question presented and make an order in accordance with such determination.

The population of the town of Kinderhook, according to the last census, was 3,356.

Under the amendment to section 8 of the Liquor Tax Law (chapter 623 of the Laws of 1917) the town of Kinderhook would be entitled to one certificated place for each 500 of population.

The town would, therefore, be entitled to six liquor tax certificates. Under the law previous to the amendment it was entitled to and had sixteen certificated places for the sale of liquor to be drunk upon the premises.

In the town of Kinderhook there are two incorporated villages, Kinderhook with a population of 827 and Valatie with a population of 1,410 and in the town there is territory outside of the two villages mentioned.

Of the sixteen certificates outstanding before the law was amended in the town of Kinderhook four were in Kinderhook village, seven in Valatie and five in the town outside of the villages.

The amendment of the Liquor Tax Law which we are examining provides for the appointment of three commissioners by the town board of each town who "shall, before August tenth, nineteen hundred and seventeen, investigate as to the location of places within such city or town where trafficking in liquors is engaged in under liquor tax certificates issued under subdivision one of this section, and may inquire as to the conduct of such business at such places. Upon the

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completion of such investigation and inquiry, which shall be on or before September first, nineteen hundred and seventeen, the said commission shall determine as to the places within such city or town, not exceeding the ratio of one for each five hundred of the population thereof, where trafficking in liquors may be continued during the ensuing year, beginning October first, nineteen hundred and seventeen, under liquor tax certificates issued under subdivision one of this section."

The amended law further provides: "The determination of such commission shall be final and conclusive. In case such commission shall fail to designate on or before September first, nineteen hundred and seventeen, the places in such city or town for which liquor tax certificates may be issued, or in case * * * the town board of a town refuses or fails to appoint such commissioners, or if for any other cause such designation is not made, the state commissioner of excise shall designate said places."

The town board of Kinderhook appointed a commission under the provisions of the amended law. That commission made certain designations. It was the duty of the local commission appointed by the town board to reduce the number of places in the villages as "nearly as may be" in proportion to the number of places then trafficking in liquors, namely, sixteen, at the time of the investigation.

The local commission certified to two in the village of Kinderhook, three in the village of Valatie and one in the town outside of the two villages.

The state commissioner of excise notified the county treasurer of Columbia county not to issue any certificates for the town of Kinderhook.

The state commissioner then filed a designation of places which were to be allowed to traffic in liquors after October 1, 1917.

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The state commissioner of excise in the designation by him made allowed one to the village of Kinderhook, three to the village of Valatie and two to the town outside of these two villages.

The state commissioner of excise reduced the number of certificates, as determined by the local commission appointed by the town board, in the village of Kinderhook from two to one. By such reduction the state commissioner omitted William Hickey, one of the petitioners herein.

The state commisioner of excise in his designation for the village of Valatie fixed upon the same number as was determined by the local commission appointed by the town board but omitted from such designation for the village of Valatie Alfred Snyder, the petitioner herein, substituting for him the name of some other person.

The state excise commissioner contends that the designations made and filed by the local commission appointed by the town board are void because such designations do not "reduce the number of places in each of such villages and parts of villages and in the territory of such town outside of such villages *as nearly as may be* in proportion to the number of places where trafficking in liquors was engaged in at the time of the investigation," for the reason that the proportion was not sustained by the closest possible mathematical accuracy.

The state commissioner claims that exact mathematical accuracy would mean that Kinderhook village would be entitled to one and one-half certificates, the town outside of the villages would be entitled to one and seven-eighths certificates and that, therefore, the designation of two places in Kinderhook village, representing one and one-half certificates, and the designation of one place in the town outside of the vil-

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lages representing one and seven-eighths certificates, are not as accurate as it is possible to make them, and that, therefore, the designation of the local commission appointed by the town board not being accurate in this respect is, therefore, void, and that the situation is as if the local commission had made no designations, and that it was the duty of the state commissioner of excise to make the designations which he filed with the county treasurer, and which upon this application he desires should be sustained.

It is of course impossible to make under the provisions of the law an exact mathematical proportionate designation; that is not only recognized by us, but it is recognized by the provisions of the law itself.

The local commission was called upon to reduce the number in the villages as nearly as may be in proportion to the number of places that trafficked in liquors at the time. This commission was called upon to act "as nearly as may be."

As has been said by the courts, this does not mean as "nearly as may be possible," or "as near as may be practicable," but it certainly means, under the construction which the courts have heretofore placed upon this expression, that the commission charged with the responsibility, local in its character, and in its make-up, was called upon to exercise a wise and honest discretion, and if it so acted, although it may be its act or conclusion or determination would vary somewhat from the determination or conclusion of some other body charged with a like responsibility, unless it has abused that discretion, unless it is apparent from what it has done or failed to do that it has not done or attempted to do that which the law calls upon it to do, namely, to sustain the proportion as nearly as may be, then, and only then, would the court interfere.

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This local commission, appointed by the town board, is called upon under the law to investigate and inquire as to the location of places within the town where previous to the amendment of the act trafficking in liquors was engaged in, and also to inquire as to the conducting of such business at such places, and upon the completion of such investigation and inquiry that then it shall determine as to the places within the town where hereafter the business of liquor selling shall continue for another year.

The petitioner Hickey of Kinderhook village is the proprietor of the Lindenwald Hotel, the site of a hotel for over fifty years. It may well be that that fact was taken into consideration by the local commission in designating the places in this old village.

The counsel for the excise commissioner did not explain, to the satisfaction at least of this court, why the commissioner when making designations in the town of Valatie of the same number of places as designated by the local commission assumed to substitute the name of some person for that of the petitioner Snyder.

The evident theory and intent of the enactment seems to be in the first instance at least to vest in this local commission, appointed by the board representing the town, the responsibility not only of investigating and inquiring as to the places and character of the places, and, when that is done, making the designations in number and locality as required by the law, and unless there has been an abuse of the power vested in the local commission the designations by the local commission become final and conclusive, and it does not seem as if the state commissioner of excise would be justified under the law in substituting one person for another as a certificate holder.

The only theory upon which the state commissioner

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of excise sustains his contention is that the certificate filed by the local commission is void and of no effect, and that, therefore, the local commission has failed absolutely in the performance of its duty.

The provision of the amended law is that: "The determination of said commission (that is the commission appointed by the town board) shall be final and conclusive."

There is no doubt as to the meaning of that phraseology, and the state excise commissioner is not authorized or empowered to designate the places to be certificated except in the case that the local commission shall fail to designate on or before September 1, 1917, or in case the town board of a town refuses or fails to appoint such commission, or if for any other cause such designation is not made. Then, and then only, can the state commissioner act.

The determination of the local board is final and conclusive unless it appears that it has failed in the exercise of the discretion with which it is vested or has abused that discretion.

In the papers before this court and upon the admitted facts there seems to be no evidence from which this court would be justified in assuming that the local commission appointed by the town board had thus failed.

Its certificate was made in time. It was duly filed. It was probably as nearly accurate mathematically, having regard to the proportion which the law calls upon the commission to sustain, as could be, and therefore the applications of these petitioners asking for a determination directing the county treasurer of Columbia county to issue to each of them, respectively, a liquor tax certificate to traffic in liquors at the places designated by the local commission, is granted.

Applications granted.

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THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v. EUGENE W. DURKEE, Defendant.

(Supreme Court, Albany Special Term, October, 1917.)

Penalties — action to recover — pleading — labels — Agricultural Law, § 201.

The manufacturer of "Durkee's Salad Dressing and Meat Sauce" which is not an imitation nor offered for sale under the distinctive name of another article, and which contains no unwholesome added ingredients, is not required to disclose his trade formula in order that freedom may be secured from adulteration or imitation, and the complaint in an action against him to recover a penalty for an alleged violation of section 201 of the Agricultural Law (as amd. by Laws of 1914, chap. 494), because of his failure to make a statement on the label used on such product as to the ingredients thereof, will be dismissed, with costs.

ACTION to recover a penalty.

Merton E. Lewis, Attorney-General (Charles M. Stern, Deputy Attorney-General, of counsel), for plaintiff.

George L. Flanders, for Commissioner of Agriculture.

Breed, Abbott & Morgan (Sumner Ford, of counsel), for defendant.

RUDD, J. The issues in this action were tried before the court without a jury.

The action is brought to recover a penalty, the plaintiff alleging a violation of the Agricultural Law of the state (as amd. by Laws of 1914, chap. 494).

The violation alleged is because of the failure of

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defendant to make a statement on the label used on defendant's product as to the ingredients thereof.

There is no particular dispute of fact.

The important and controlling facts have been by the parties stipulated and are presented to the court that the question may be fairly determined as to whether the defendant is guilty of the alleged violation of the law.

The defendant is the manufacturer of what is known and for many years has been sold as "Durkee's Salad Dressing and Meat Sauce."

This product was first made according to a secret formula by the defendant's father over fifty years ago. It has been made in the same way and for over thirty years has been sold under the same label. For fourteen of these years the statute which the defendant is alleged to have violated has been in force.

The formula and the product are commercially valuable because of the reputation which the product has with the purchasing public. The product is admitted to be wholesome and not injurious to public health, and it contains no chemical, preservative or artificial coloring matter or unwholesome or inferior ingredient of any kind.

The business of the defendant is that of importing, exporting, manufacturing and selling spices, mustard, sauces, extracts and similar products.

An analysis by a chemist in the employ of the department of agriculture shows that the salad dressing contains sodium chloride, acetic acid and mustard, that sodium chloride indicates the presence of salt, acetic acid indicates the presence of vinegar, and salt, vinegar and mustard are the ingredients of salad dressing. It also contains other ingredients.

The commissioner of agriculture contends that section 201 of the Agricultural Law requires a statement

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to be set forth upon the label of all food products which are compounds, mixtures or blends, of the ingredients, and that failing in such statement the product is adulterated and misbranded, and the law violated.

Section 201 of the Agricultural Law defines adulterated or misbranded food. There are in the section six separate definitions of the meaning of adulterated food. There are three subdivisions specifying what is deemed the misbranding of an article of food.

The food product here in question made by the defendant, known as "Durkee's Salad Dressing and Meat Sauce," does not come under any one of the six subdivisions of the section relating to an article of food which shall be deemed to be adulterated, although the commissioner of agriculture contends to the contrary. Neither does the defendant's product come under the 1st or 2d subdivision of the article relating to the misbranding of an article of food.

The commissioner of agriculture in the brief submitted on behalf of the people contends that Durkee's Salad Dressing consists of "mustard to which has been added acetic acid, a well-known poisonous ingrelient, and sodium chloride, and is sold upon the market without disclosing to the public the nature of the product," and because the product is mustard to which has been added sodium chloride and acetic acid, which lower and injuriously affect the quality or strength of the mustard as mustard, that therefore the product is an adulterated product within the meaning of subdivision 1 of section 201 of the Agricultural Law.

This contention cannot be sustained. It nowhere appears in the papers that the product is mustard, and that because acetic acid is one of the ingredients that that means that it is adulterated and misbranded, and it is not true by the stipulation and agreement

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entered into between the parties to this action that acetic acid as such, or what is known commercially as acetic acid, is contained in the product. It certainly does not appear that "acetic acid, a well-known poisonous ingredient," is contained in the product.

It is agreed between the parties hereto, as heretofore stated, that acetic acid in the product indicates the presence of vinegar, and that sodium chloride indicates the presence of salt.

According to the Agricultural Law all genuine vinegar must contain acetic acid, and it is admitted as one of the facts by the parties that this product contains no unwholesome or inferior ingredients of any kind. That fact is established by the admission in the reply of the plaintiff, in admitting an allegation of the defendant in the answer to that effect.

The commissioner of agriculture states in his brief that acetic acid is admittedly a poisonous ingredient which may affect the product so far as to render it injurious to the health of the person consuming it, if such acetic acid is not diluted.

This contention is not at all sustained; in fact, the people have admitted facts which indicate, as above stated, that such is not the fact.

The commissioner of agriculture states, in his brief, that the objections to the sale of this product are not placed upon the ground of misbranding or falsely branding, but upon the ground that the product is an adulterated product and thus its sale is forbidden, unless the product is one that comes within the exceptions of the statute, which would entitle the product to be sold by virtue of the protection of such exception.

The exceptions to which the commissioner has alluded are two, and follow subdivision 3 of the definitions in section 201 of the Agricultural Law relating to misbranding. The latter part of subdivision 3 reads

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as follows: "provided, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

"*First.* In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names and not included in definition first or third of misbranded articles of food in this section."

Definition *first* above referred to relates to an article in imitation of or offered for sale under the distinctive name of another article.

That does not apply to Durkee's Salad Dressing, which is not an imitation, nor is it offered for sale under the distinctive name of another article.

Subdivision three, just above referred to, relates to a package which shall bear a statement regarding the ingredients or the substances contained therein, which statement shall be false or misleading in any particular, or if the same is falsely branded as to the state or territory in which it is manufactured or produced, or if it shall be contained in, or served in or from any bottle or receptacle falsely marked, labeled or branded, as to the name of the person.

That definition does not condemn Durkee's Salad Dressing.

Thus the first exception under subdivision 3 is not applicable.

As to the second exception under definition 3, as to misbranding articles, let us see what this is. It reads:

"*Second.* In the case of articles labeled, branded or tagged so as to plainly indicate that they are mixtures, compounds, combinations, imitations or blends; provided, that the same shall be labeled, branded or tagged so as to show the character and constituents thereof."

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The label on Durkee's Salad Dressing shows that it is a mixture but it does not show the constituents thereof.

The exception goes further and provides as follows: "that nothing in this article shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredients to disclose their trade formulas, except in so far as the provisions of this article may require to secure freedom from adulteration or imitation."

For clearness sake let us, at the risk of repetition, state the respective claims. The claim of the commissioner of agriculture apparently is that the provisions in the latter part of the third definition of misbranding articles require a statement of the constituents to be placed upon the label of all food products which are mixtures, blends or compounds of different ingredients, and that without such a statement the product under the law is adulterated and misbranded.

The defendant's claim is that the latter clause of the third definition of misbranding articles applies only to cases where the product is adulterated or misbranded, in one of the ways enumerated above in the first, second or third definition of misbranding articles under section 201, and because this product is not adulterated or misbranded in any of the ways specified the requirement of the second exception under subdivision 3 does not apply; and, secondly, the defendant claims that the article being sold under its own distinctive name it is not necessary that its ingredients be stated upon the label.

The statute clearly reads: "provided, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be

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deemed to be adulterated or misbranded in the following cases: "

The first case is that of mixtures or compounds which are sold under their own distinctive names and not included in the first or third definitions of misbranding articles of food.

Notwithstanding the contention of the defendant it does not seem clear that Durkee's Salad Dressing is sold under its own distinctive name, and therefore the first exception just quoted does not apply.

In the second exception it is provided " that nothing in this article shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredients to disclose their trade formulas, except in so far as the provisions of this article may require to secure freedom from adulteration or imitation."

In Durkee's Salad Dressing and Meat Sauce, from the facts which appear as admitted here, the product contains no unwholesome added ingredients, and therefore the manufacturer thereof is not required to disclose his trade formula, in order that freedom may be secured from adulteration or imitation.

There is no adulteration or imitation, and it is not necessary to secure freedom therefrom, and the trade formula should not therefore be disclosed.

The Special Term has passed upon this question in *People* v. *Henderson*, 74 Misc. Rep. 577, in a similar action brought by the commissioner of agriculture concerning a salad dressing known as " O'Donohue's Fifth Avenue Salad Dressing." Mr. Justice Tompkins said: " that the ingredients are only required to be given where the article sold is an imitation or adulteration of some standard article of food, and that the burden is upon the people to show that the article sold is an imitation or a deleterious adulteration of some

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article of food. There is no proof here that the article sold was an imitation, or that it was injurious to the public health. It was sold as a salad dressing; and, to bring it within the law requiring a statement of its constituent parts, it seems to me there should be proof showing that there is some standard merchantable salad dressing and that the article sold is not that article. So far as the proof shows, it may itself be the standard salad dressing. The object of the law is to prevent deception and to forbid the sale of inferior or deleterious products without giving the public notice of just what is being sold. There is here no evidence of either. True, it does appear that the bottle sold by the defendant was a mixture of several ingredients; but that is not prohibited by law, unless it is sold as an imitation of some commodity, or is injurious to the public health and calculated to deceive the public. I do not see how the people's contention here can be upheld without requiring every make of salad dressing to be labeled with the ingredients thereof; because there is no proof of a standard salad dressing and there is no evidence that any ingredient of this salad dressing is unwholesome, or foreign to true salad dressing."

The federal statute defines in what manner food shall be deemed adulterated and misbranded, and that clause has been construed by the federal court as not being an affirmative requirement but as a clause excepting articles which comply therewith from the definition of adulterated and misbranding. *United States* v. *68 Cases Syrup*, 172 Fed. Repr. 781; *United States* v. *779 Cases Molasses*, 174 id. 325.

In 1907 the attorney-general of the state, in an opinion rendered to the commissioner of agriculture, held that a statement of the ingredients was not required upon the article here in question.

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Attorney-General Mayer in construing the second exception in section 201 of the Agricultural Law, in an opinion addressed to the commissioner of agriculture, said:

"The exception 'Second' relating to articles labeled, etc., so as to plainly indicate that they are mixtures, etc., applies, in my opinion, to mixtures, compounds, combinations, imitations or blends which have not a distinctive name in the sense of an arbitrary name, or which from their name, label, brand or tag, indicate that the constituent element of the mixture, compound, combination, imitation or blend is some known substance.

"The object of this portion of the statute was that where a person is buying a mixture, compound, etc., represented by label, brand or tag to be composed in part of a known food, that such person should be informed as to the constituent elements of such mixture, compound, etc."

The opinions expressed by the attorneys-general seem to have been the construction placed upon this particular portion of section 201 of the Agricultural Law for many years.

These decisions are not controlling, necessarily, but it evidently has been the policy of the state, and while we all should recognize and welcome the constant efforts by legislation and otherwise to protect the purchasers of food products from deleterious combinations, and from all imitations and certainly from all adulterations where the purchaser is supposed to purchase an adulterated article, still to change the policy to the extent that it would change it with reference to this particular product, under the admitted facts in this case, would work a hardship unjustifiable in its character, it seems to this court.

A product so well and so favorably known, concern-

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ing which the department of agriculture and the attorney-general representing that department frankly admit is a wholesome article of food, which has been sold, as before stated, under the same label for thirty years, which has been made and sold in the markets of our state and throughout the country for over fifty years, and which has been on the market during the life of this portion of the Agricultural Law for over fourteen years without containing upon the label a statement of its ingredients, has, it seems to this court, justified the wisdom and correctness of the construction of those portions of the statute to which our attention has been directed, concerning which it seems that there has been on the part of the defendant no violation for which he should be held liable for the penalty fixed by statute. An order may be entered dismissing the complaint of the plaintiff, with costs.

Ordered accordingly.

Matter of the Will of ANNA M. HEMSTREET, Deceased.

(Surrogate's Court, Madison County, October, 1917.)

Wills — construction of — devise — gift — villages — power of sale — General Municipal Law, § 73 — Code Civ. Pro. § 2615.

A devise and bequest of the home of testatrix with its furnishings to the trustees of a village to be used by it as a general and emergency hospital for the care and treatment of the sick and injured was conditioned upon the village raising each year a certain sum by tax for the general support, care and maintenance of said hospital, with a proviso that in case the home should not be used by the village for the designated purpose, or used at any time for any other purpose, or its officers neglected to carry out the purposes of the devise and bequest, the same should become null and

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void, the property sold and the proceeds given to another institution. In a proceeding under section 2615 of the Code of Civil Procedure for the construction of the will, *held*, that in case the gift was accepted by the village and the hospital otherwise established and maintained in a manner prescribed by the will and sufficient money is raised by tax from time to time, which with gifts and revenues derived from other sources will support and maintain said hospital to conform to the true spirit and intent of the will, and it should be clearly unnecessary to that end to raise the sum in any year or years, the failure to raise such sum by tax will not work a forfeiture and nullify the gift.

However, the provision that the devise and bequest should become null and void, etc., is to be considered as the suggestion of testatrix as to the manner, character and extent the hospital is to be maintained, and should it ever become a question of fact as to whether it is being maintained for the purposes and in the manner directed by the will, all the circumstances would have to be considered in connection with the direction in the will as to raising money; otherwise, if the hospital is not in good faith maintained as directed by and for the purposes designated in the will, the property will be forfeited.

Under section 73 of the General Municipal Law, which provides that real and personal estates may be granted and conveyed to the corporation of any city or village of this state to be held in trust for any purpose of education, or the diffusion of knowledge, or for the relief of distress, the village and its trustees have legal capacity to receive said devise and the accompanying bequest for the purposes specified in the will.

A contention that all blacksmith tools, firearms, guns, revolvers, carpenter tools, farming tools and other articles mentioned in the inventory and in the testimony do not belong in the furnishings of the house and that articles obtained and purchased since the making of the will are to be deemed general assets of the estate not specifically bequeathed to the village, upheld.

The direction in the will that the real estate be sold in a certain event, and the proceeds given to another institution, vested a power of sale in the executors, though such power was not specifically given by the will.

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PROCEEDING upon the construction of a will.

George B. Russell, for executors.

John L. Robertson, for village of Canastota and certain heirs at law.

Edwin J. Brown, for Old Ladies Home of Madison County.

SENN, S. Anna M. Hemstreet of Canastota, N. Y., the testatrix, died on or about the 8th day of June, 1916, leaving a last will and testament, which has been duly admitted to probate. The will, among other things, contains the following:

"*Second.* I give, devise and bequeath, to the Trustees of the Village of Canastota, N. Y. and their successors in office, in trust, for the purpose of creating, establishing and maintaining, under the following terms and conditions and the provisions of this grant and devise, my home situate in the Village of Canastota, N. Y. on the west side of Peterboro St., in said Village, to be used by said Village of Canastota, as a general and emergency hospital for the care and treatment of the sick, which shall be under the supervision of a Board of Managers, the Chairman of which Board shall be a practicing physician and resident of the Village of Canastota, and which shall be at all times open for the reception of the sick and injured, irregardless of age, sex or color, subject to the visitation and inspection on such days as shall be fixed by the Board of Managers to all visitors and by an authorized representative of the State Board of Charities. Said general and emergency hospital shall be known as the Hemstreet General and Emergency Hospital, named after Dr. Hiram Hemstreet and in commemora-

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tion of his many years practice as a physician in the Village of Canastota. The Village of Canastota to raise each year by tax for the general support, care and maintenance of said hospital the sum of $1,000 annually and in case said home shall not be used by said Village of Canastota for such purpose as herein mentioned in this bequest and devise, or said Village of Canastota, or its officers shall neglect to carry out the purposes of this devise and bequest, or it shall be used for any other purpose at any other time than as herein specified, then this bequest shall become null and void, the property be sold and the proceeds given to the Old Ladies Home of Madison Co., N. Y."

"*Eleventhly.* I give and bequeath to the Trustees of the Village of Canastota, N. Y. and their successors in office in trust, the furnishings now in my home, to be held by them for the benefit of the Hemstreet General & Emergency Hospital, above provided for, together with the medical library, which the late Dr. Hemstreet used, this provision and bequest is subject, however, to such reservations and bequests as I have herein particularly specified as gifts to certain friends, and is given under the following conditions:— That three pictures now hanging upon the wall, one being Dr. Hiram Hemstreet, my late husband, and another Mrs. Hubbard, my mother, the other being my own, I desire that these three pictures remain hanging where they are, properly cared for and kept, and never to be removed therefrom, as a remembrance and a reminder to those who are the recipients of this gift of the donor and that their names may be perpetuated in their memory."

Pursuant to section 2615 of the Code of Civil Procedure, the surrogate is asked to judicially construe these provisions and especially as to whether a failure to raise the sum of $1,000 by tax every year would

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cause a forfeiture and nullify the legacy. On the part of the village of Canastota, it is obviously necessary to be judicially advised in this regard in order to determine whether in view of the conditions imposed it is advisable to accept the property; for even though the people of the village should be otherwise willing to accept the legacy and so assume the responsibility of maintaining a hospital in the manner prescribed by the will, they might hesitate to do so if at any time an adverse vote on the proposition to raise $1,000 would result in the loss of the property.

As usual in such cases this will has its own characteristics and probably has no exact counterpart in any other will. While there are many decisions more or less analogous none of them are precisely in point. Therefore the instrument must be interpreted in the light of those general rules which the courts have from time to time formulated and prescribed for the interpretation of wills.

The first thing to be considered is, what was the intent of the testatrix. It is a very familar and well-settled general rule of law that the intent of the testatrix, if not inconsistent with the law, must govern. The intent must be read from the instrument itself unless by reason of inconsistencies, contradictions or ambiguities this cannot be done. If any provision, otherwise obscure, can be clarified by comparison with the other provisions, this may be done as far as the various parts have any connection or bearing, one to the other. In ascertaining its meaning all the parts of the instrument are to be taken together and no part should be rejected as inoperative if the whole can reasonably stand together.

A clearly manifested intention in any part ought not to give place to a doubtful or ambiguous provision. *Corrigan* v. *Kiernan,* 1 Bradf. 208.

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Where a clause in a will bears upon its face two absolutely different and inconsistent intentions, upon one of which the disposition would be void, the court should adopt the other. *Roe* v. *Vingut,* 21 Abb. N. C. 404; affd., 117 N. Y. 204.

The general intention must be carried into effect though it may defeat a particular intent. *Jackson* v. *Veeder,* 11 Johns. 169.

The rule as to special intentions is to give effect to the whole of testator's language expressing his particular intent, provided it is not inconsistent with his general intention, which must govern. *Parks* v. *Parks,* 9 Paige, 119.

A general or primary intention will prevail over a particular or secondary one. *Lovett* v. *Kingsland,* 44 Barb. 560; affd., 35 N. Y. 617.

A secondary intention inconsistent with the primary intention must yield. *Post* v. *Post,* 47 Barb. 89.

If the provision in Mrs. Hemstreet's will that the village is to raise $1,000 by tax annually for the care and maintenance of the hospital is to be considered in the light of a condition, it is a condition subsequent and those are not favored by law.

"As the tendency of conditions subsequent is to defeat estates, the courts are disposed to construe them strictly and they are frequently relieved against in equity. *DeVeaux College* v. *Highlands Land Co.,* 63 App. Div. 461, citing *Woodworth* v. *Payne,* 74 N. Y. 196; *Graves* v. *Deterling,* 120 id. 447; 2 Story Eq. Juris. §1319 *et seq.*"

" Conditions in grants are not favored in law, and hence they must be clearly expressed. (*Craig* v. *Wells,* 11 N. Y. 315.) They are also to be construed with great strictness, because they tend to destroy estates; and the rigorous exaction of them is a species of *summum jus,* and in many cases hardly reconcilable

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with conscience. (4 Kent's Com. 130.) Nor are they to be sustained by inference or recital." *Woodworth* v. *Payne*, 74 N. Y. 199.

The foregoing was a case where land was conveyed for the purpose of having a church erected thereon and for church purposes. It provided as follows: "The above described land being designed for church purposes, it is understood and agreed that the seats therein shall be forever free for the use of any and all persons to occupy in the capacity of worship; but if the seats of the said church to be erected thereon, or any other church thereon, shall be *rented or sold*, then the said above described premises shall revert to the said party of the first part or her heirs." And it was held that a sale of the whole of the church property to a private individual, but on the same conditions as in the original grant, made under order of the court for the purpose of paying an indebtedness, was not a violation of the conditions of the original grant. Also, that a sale of the whole premises was not a sale of the seats, although the seats were included in the sale. That the interest in a pew is separate from the fee and they may be leased and held distinct from the fee. See, also, *Erwin* v. *Hurd*, 13 Abb. N. C. 91.

While conditions subsequent can be imposed without the use of technical words, as they are not favored by law, they must be clearly expressed, and if it is doubtful whether a clause is a covenant or a condition the courts will so construe it, if possible, as to avoid a forfeiture. *Graves* v. *Deterling*, 120 N. Y. 455, citing *Craig* v. *Wells*, 11 id. 315.

Whether the words in a devise are strict common law conditions annexed to an estate, a breach of which will work a forfeiture and defeat the devise, or merely regulations for the guidance of the trustees and explanatory of the terms under which it was intended to

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have it managed to the greatest advantage, is a matter to be determined not by any particular expressions in a devise, but by the entire will. *Stanley* v. *Colt,* 5 Wall. 119.

The will of Stanley gave certain real property to a religious corporation and provided that the property should be leased in the manner set forth in the will and never sold. Pursuant to an enabling act of the legislature of the state of Connecticut, where the property was situated, portions of this property were sold, one parcel to the defendant Colt against whom ejectment was brought by the heirs at law of the testator. The Supreme Court of the United States held that the action was properly dismissed, holding that the will simply established a code of regulations to guide the trustees and which would continue for all time; and that this was wholly inconsistent with the idea that the estate might be defeated by a breach of any one of them; that it was a devise in fee upon trust; that the heirs at law could not take advantage of a condition broken, although the *cestui que trust* could compel an observance of the trust by a suit in equity. The court held that there was a condition created by the use of the word "provided," which was an appropriate word to constitute a common law condition in a deed or will, but that this is not the fixed and invariable meaning attached to it by the law and on the contrary it gives way to the intent of the parties as gathered from an examination of the whole instrument.

Many other cases are of like tenor with reference to conditions subsequent, but it seems to be too well settled to require further citation of authorities that such conditions are not favored in law and are as a rule strictly construed and will not be rigidly enforced, at least not by forfeiture, unless they provide in express terms for a forfeiture in case of breach.

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Of course, where a devise is in plain and unmistakable words made dependent upon the performance of a condition subsequent, the same will be forfeited in case of a breach.

In my opinion, the will of Anna M. Hemstreet does not in any sense stipulate for a forfeiture in case the village of Canastota should fail to raise the sum of $1,000 annually for the general support, care and maintenance of the hospital. Indeed, I do not think it provides for such forfeiture either directly or by implication. She has specifically stated the acts or omissions which will cause a forfeiture, viz.: "and in case said home shall not be used by said Village of Canastota for such purpose as herein mentioned in this bequest and devise, or said Village of Canastota or its officers shall neglect to carry out the purpose of this devise and bequest, or it shall be used for any other purpose at any other time than as herein specified, then this bequest to become null and void, the property be sold and the proceeds turned over to the Old Ladies' Home of Madison County, N. Y."

The will does not state specifically or generally that there is to be such forfeiture in case of a failure to raise $1,000 annually by tax. It is true that the direction to raise this money is contained in the same sentence in which the causes of forfeiture are stated, and it might be contended that she had it in mind and really meant to say that there was to be a forfeiture in case of a failure to raise a tax. But such an interpretation would not only be at variance with the words employed, but what is more to the point it is unreasonable to suppose that she meant to provide a forfeiture for a failure to raise the tax annually whether needed or not. She certainly had the right to make this condition whether we consider it to be reasonable or not, but it is nevertheless to be presumed that she intended to

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be reasonable and in case of doubt it is our duty to interpret her words in harmony with that presumption. The purpose of the gift was to create and suitably maintain a hospital for the care and treatment of the sick and injured and to perpetuate and commemorate the name of Hemstreet in the village of Canastota where he had practiced his profession for many years. There was a twofold purpose, one of them benevolent and charitable, and the other to perpetuate a name; two motives, charity and family pride.

It was not one of the purposes of the will to have money raised by tax, but it was intended to provide for the hospital suitable maintenance. She could not have intended it to be a forfeitable condition for instance, in case that the money should be raised from other sources or by donations or from revenues from paying patients. She intended to have it maintained as well as $1,000 per annum, in addition to probable revenues, would support it.

My interpretation of the will therefore is that in case the gift is accepted by the village of Canastota and the hospital is otherwise established and maintained in the manner prescribed by the will and sufficient money is raised by tax from time to time, which with gifts and revenues derived from other sources will support and maintain it, to conform to the true spirit and intent of the will, and it should be clearly unnecessary to that end to raise the sum of $1,000 in any year or years, there being sufficient funds for that purpose from whatsoever other source, that then and in that case the failure to raise such sum by tax would not work a forfeiture. However, the provision in question is not entirely immaterial, but is to be considered as her suggestion as to the manner, character and extent the hospital is to be maintained, and in case it should ever become a question of fact as

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to whether the hospital is being maintained for the purposes and in the manner directed by the will and as to whether sufficient money is being provided for that purpose, all the circumstances would have to be considered in connection with the direction in the will as to raising money. Otherwise, if the hospital is not in good faith maintained as directed by the will and for the purposes intended and directed the property would be forfeited.

Counsel for the Old Ladies' Home raises the question as to whether the village of Canastota or its trustees have capacity to take property in trust by devise for the purposes set forth in the will. I think this question is effectually disposed of by section 73 of the General Municipal Law, which provides that real and personal estates may be granted and conveyed to the corporation of any city or village of this state to be held in trust for any purpose of education, or the diffusion of knowledge, or for the relief of distress.

I do not think there is any doubt but that the purposes of a hospital are largely for the relief of distress, and so I thing the devise comes squarely within the intent and purview of the section.

Counsel contends that there is a distinction between a grant or conveyance and a devise. There is, to be sure, a technical distinction, but I think it so highly technical that it is a distinction without a difference. I therefore hold that the village of Canastota and its trustees have legal capacity to receive this devise and the bequest accompanying the same set forth in the same will for the purposes specified in the will.

The contention of Mr. Russell, the executor's attorney, that all blacksmith tools, fire arms, guns, revolvers, carpenter tools, farming tools and other articles mentioned in the inventory and in the evidence do not belong to the furnishings in the house and that the

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articles mentioned in the evidence of Mrs. Van Valkenberg as having been obtained and purchased since the making of the will, are to be deemed general assets of the estate not specifically bequeathed to the village of Canastota under the will, is upheld. Mr. Russell asks me also to hold that the direction in the will that the real estate be sold (in a certain event) and the proceeds given to the Old Ladies' Home of Madison County gives a power of sale to the executors, although the power is not specifically conferred in the will. I think this is correct and so hold. It was held in *Meehan* v. *Brennan*, 16 App. Div. 395, that a power of sale may be implied by words prescribing that there is to be a sale even though, as in that case, no executor was named and it did not state by whom the direction to sell was to be carried out and that administrators with the will annexed were empowered to execute the sale.

A decree construing the will in accordance with the foregoing opinion may be prepared.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of Proceedings of ERNEST E. L. HAMMER, Public Administrator of the County of Bronx, as Administrator of the Estate of ALBERT R. SMITH, Deceased.

(Surrogate's Court, Bronx County, October, 1917.)

Survivorship — accounting — executors and administrators — evidence — decedents' estates — insurance (life).

A decedent, his wife and daughter perished in a common disaster and there was no evidence to show which of them was the last survivor. At the time of his death the decedent carried two policies of insurance upon his life. One of the administrators of the wife's estate claimed that her repre-

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sentatives were entitled to the proceeds of the two policies in question and to the entire net distributive amount of the decedent's estate as her distributive share, but the accounting administrator rejected the claim. In determining the validity of the same, and the question whether the daughter survived the decedent and her mother or either of them: *Held*, that under the common law one claiming through survivorship must prove such survivorship; that there is no presumption of survivorship in a case where persons perish in a common disaster, and that in the absence of evidence the fact of survivorship is assumed to be unascertainable and property rights are disposed of as if death occurred at the same time.

That under the policies in question the interest of the wife was contingent and a mere expectancy which did not vest until the death of the insured; that survivorship was a condition precedent to the vesting, and that the onus of proving such survivorship was upon the claimant.

That as there was no evidence to prove such survivorship the death benefit must be disposed of as though both husband and wife had died at the same instant and that it must be distributed as though she had died before her husband, in which event it vested in him and was payable to his personal representative.

That there being no evidence on the subject, and the law indulging in no presumption, no determination can be made as to whether the daughter survived either or both of her parents.

That the other property for which the administrator accounts must be likewise distributed, as though the decedent, his wife and his child had died at the same time.

PROCEEDINGS upon the judicial settlement of the accounts of an administrator.

Ernest E. L. Hammer, public administrator, petitioner, in person.

Charles Fox, administrator, estate of Gladys E. Smith, respondent in person.

SCHULZ, S. The decedent, his wife, Gladys E. Smith, and his daughter, Dorothy Smith, the latter an infant

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under the age of fourteen years, were passengers upon the ill-fated steamship *Lusitania* and perished when the same was sunk on May 7, 1915. No evidence is at hand to show which of the three persons named was the last survivor.

At the time of his death the decedent carried, among others, two policies of insurance upon his life. In each of these policies the insurance company promised "to pay * * * to Albert R. Smith * * * herein called the Insured, on the fifth day of April, 1923, if the Insured be then living, or upon receipt at said Home Office of due proof of the prior death of the Insured, to his wife, Gladys E. Smith the beneficiary, with the right to the Insured to change the beneficiary * * * upon the surrender of this policy properly receipted.

"Death of Beneficiary before Insured: Change of Beneficiary.— If any beneficiary die before the Insured, the interest of such beneficiary shall vest in the Insured, unless otherwise provided herein.

"When the interest of a beneficiary shall have vested in the Insured, or when the right to change the beneficiary has been reserved, the Insured * * * may * * * designate a new beneficiary, by filing written notice thereof at the Home Office of the Company accompanied by this Policy for suitable endorsement hereon." The account shows that the insurance company paid the amount of the two policies in question to the administrator of the decedent's estate and to the administrators of Gladys E. Smith, jointly.

One of the latter filed a claim with the accounting administrator claiming that the estate of Gladys E. Smith is entitled to the proceeds of the two policies in question and is also entitled to receive the "entire net distributive amount of the estate" of the decedent as her distributive share. The accounting admin-

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istrator rejected this claim. I am now asked to determine the validity of the said claims, and to further determine the question whether Dorothy Smith, the daughter, survived the said Albert R. Smith and Gladys E. Smith or either of them.

Under the common law one claiming through a survivorship must prove the survivorship. There is no presumption of survivorship in a case where a number of persons perish in a common disaster as in this case. In the absence of evidence, the fact of such survivorship is assumed to be unascertainable and property rights are disposed of as if death occurred at the same time. Counsel agree that such is the law and abundant authority for it is at hand. *Newell* v. *Nichols,* 75 N. Y. 78; *St. John* v. *Andrews Institute,* 191 id. 254; *Matter of McInnes,* 119 App. Div. 440; *Middeke* v. *Balder,* 59 L. R. A. 653, 198 Ill. 590. Each contends, however, that the law as thus enunciated, when applied to the facts of the present case, throws the onus of proving survivorship upon the other. The accounting administrator urges that before the estate of the wife can recover her representatives must prove that she survived her husband; that having conceded that it is impossible to establish that fact by evidence the property rights of the decedent must be disposed of as if his death and her death had occurred at the same time or as if her death had occurred before his and hence must be paid to the personal representatives of his estate. The contention of the representative of the wife's estate is the converse.

To ascertain who is entitled to the proceeds of the policies of insurance, we must have recourse to the language of these documents. From the quotation above it will be observed that the insured was entitled to the payment thereunder, if he lived to a certain date, that he had a right at any time prior to that date

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or prior to his death to change the beneficiary, and that if the beneficiary died before the insured her interest vested in him. Under such conditions, the interest of the wife was a contingent interest, a mere expectancy which might be defeated in any one of three ways, (a) by the insured living to the date mentioned; (b) by his changing the beneficiary before his death, or (c) by her decease prior to that of the insured. *Smith* v. *National Benefit Society*, 123 N. Y. 85; *Southwell* v. *Gray*, 35 Misc. Rep. 740. The wife's interest did not vest until the death of the insured because up to that very moment he could have changed the beneficiary. If it did not vest until the death of the insured, it seems to me to follow that before it could have vested at all the widow would have had to survive the insured. This being so, her survivorship was a condition precedent to the vesting (*Bradshaw* v. *Mutual Life Ins. Co.*, 187 N. Y. 347), and the onus of proving such survivorship is, therefore, upon the claimant. *Dunn* v. *New Amsterdam Casualty Co.*, 141 App. Div. 478.

As there is no evidence to prove such survivorship and as under the facts as stated there can be none, the death benefit must be disposed of as though both husband and wife had died at the same instant, in which event there was no interval between the death of the husband and the wife during which the death benefit could have vested in the wife. It has been held that dying at the same time is the same as dying before. See cases cited in *dictum* in *St. John* v. *Andrews Inst.*, *supra*, approved of in *Dunn* v. *New Amsterdam Casualty Co.*, *supra*. It follows that the insurance must be distributed as though she had died before her husband in which event it vested in him and is, therefore, payable to his personal representative.

There being no evidence on the subject and the law

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indulging in no presumption, no determination can be made as to whether Dorothy Smith survived either or both of her parents.

Under the law as above set forth it also follows that the other property for which the administrator accounts must be distributed as though the decedent, his wife and his child had died at the same time.

The claims of the personal representative of Gladys E. Smith to the proceeds of the policies in question and to the personal property of the deceased cannot be sustained and are disallowed.

Decreed accordingly.

SAMUEL FRIEDMAN, Plaintiff, *v.* DANIEL GIBBONS, JOSEPH G. GESSFORD and REGINE STERN, Defendants.

(Supreme Court, New York Special Term, October, 1917.)

Bankruptcy — adjudication in — trustee in — judgments — foreclosure — motions and orders — garnishee order — injunctions — sheriffs — poundage — Code Civ. Pro. §§ 1391, 3307(23) — Debtor and Creditor Law, § 150.

On May 16, 1917, after a deficiency judgment in an action to foreclose a mortgage had been docketed against the defendant, a school teacher employed by the city of New York, a garnishee order issued against her salary under section 1391 of the Code of Civil Procedure was filed with the corporation counsel, and on June 1, 1917, she was adjudged a voluntary bankrupt and the claim against her under the deficiency judgment was duly scheduled. On July 7, 1917, the bankruptcy court granted an order restraining interference with her salary under the garnishee order. *Held*, that a motion made by her after her discharge in bankruptcy had been granted, August 22, 1917, to vacate the garnishee order should be granted and the city comptroller directed to pay her so much thereof as was withheld since the date of her adjudication as a bankrupt, the amount of salary withheld under the garnishee order from its

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date to the adjudication in bankruptcy to remain in the hands of said comptroller until the trustee in bankruptcy take such steps as he may be advised, with notice to the sheriff that his right of poundage under section 3307(23) of the Code of Civil Procedure, if claimed, may be protected.

All proceedings in bankruptcy relate to the time of the bankruptcy adjudication, and a contention that under section 1391 of the Code of Civil Procedure plaintiff was entitled to ten per cent of the bankrupt's salary down to the time that the judgment for deficiency should be canceled pursuant to section 150 of the Debtor and Creditor Law, which provides in substance that at any time after one year has elapsed since the bankrupt was discharged from his debts he may apply to the court in which the judgment for deficiency was rendered against him for an order directing said judgment to be canceled and discharged of record, is untenable, the provisions of the Bankruptcy Act being paramount to the state statutes.

MOTION for the vacation of a garnishee order.

Goldstein & Goldstein (Jonah J. Goldstein, of counsel), for plaintiff.

John F. Forrester, for defendants.

GOFF, J. On January 10, 1917, a deficiency judgment in foreclosure proceedings was obtained by the plaintiff against the defendant Regine Stern (along with the other defendants), a school teacher employed by the city of New York. On May 16, 1917, a garnishee order was issued against her salary under section 1391 of the Code of Civil Procedure, which order was filed with the corporation counsel on May 19, 1917. On June 1, 1917, the defendant filed with the United States District Court for the Eastern District of New York a voluntary petition in bankruptcy, and the said claim of the plaintiff was duly scheduled in said petition. On July 7, 1917, an order was issued

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by the United States District Court restraining interference with the salary of the defendant under the garnishee order. On August 22, 1917, defendant was duly discharged as a bankrupt. She now moves for the vacation of said garnishee order. The plaintiff opposes the motion to the extent of claiming "that it should not be vacated *in toto*, but only when the order upon this motion has been actually entered and to operate and become effective from that time only," and relies on *Ulner* v. *Doran*, 167 App. Div. 259. It is true that in that case the Appellate Division passed directly upon the question whether, "although the debt may have been discharged (by bankruptcy), the execution continues in force, and the levy thereunder remains a continuing lien upon salary to be earned after the discharge of the judgment." Though holding that "as to earnings which become due after the discharge in bankruptcy there remains no indebtedness to be satisfied and consequently the order permitting the issue of what is sometimes termed a garnishee execution should be modified," nevertheless, the court said (p. 262): "We think, however, that the execution remained valid and enforcible until modified as contemplated by section 1391 (*supra*), and that any moneys collected under it, even after the date of the defendant's discharge in bankruptcy, are properly payable to the judgment creditor. It was the evident intention of section 1391 that such an execution should remain in full force until satisfied by the moneys collected thereunder or modified by the court." In other words, though the debt had ceased to exist, the remedy for its enforcement remained. The Bankruptcy Act never intended that a debtor should be thus harassed by a creditor and the discharge in bankruptcy in effect postponed, and the purpose of the Bankruptcy Act nullified. Nor could such

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have been the intent of the legislature of the state of New York. Section 1391, *supra,* provides that the levy under the garnishee order should be " a continuing levy until said execution and the expenses thereof are fully satisfied and paid *or until modified as hereinafter provided,*" and as shown by a later provision of the section the modification intended was such " as shall be deemed just." Certainly the legislature were not contemplating the intervention of bankruptcy, and, bankruptcy having intervened, the section cannot arbitrarily be construed literally. Fortunately the National Bankruptcy Act and the federal decisions thereunder furnish relief from such an illogical and unjust position. Section 67-f of the Bankruptcy Act provides: " That all levies, judgments, attachments, *or other liens,* obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt." In *Matter of Ludeke,* 22 Am. Bank. Rep. 467, the garnishee order was dated January 27, 1909, the petition in bankruptcy was filed February 10, 1909, and the discharge was on April 30, 1909. Upon a motion to dissolve the lien of the garnishee order Chatfield, D. J., said (pp. 468, 469): " The bankrupt was relieved by his discharge in bankruptcy from all provable debts. The judgment in question was apparently such a debt, and the lien against his salary, it is believed, would not continue with respect to any sum not already earned, and to which lien had not specifically attached under the levy of the execution, at the date of his adjudication in

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bankruptcy, inasmuch as the discharge was granted. Under Act July 1, 1898 (c. 541, sec. 67-f, 30 Stat., 565, U. S. Comp. St., 1901, p. 3450), any amount of money so levied upon within four months prior to the filing of the petition passed to the trustee as a part of the estate of the bankrupt, unless it had been paid over and had passed to the hands of an innocent party. * * * The discharge in bankruptcy must be held to have freed the bankrupt's salary from the effect of said execution in so far as payments subsequent to the date of the adjudication are concerned, inasmuch as the judgment under which the execution was levied has been discharged, and inasmuch as the levy cannot be considered to have actually attached until the salary accrued." In *Matter of Sims,* 23 Am. Bank. Rep. 899, the levy was more than four months old when the bankruptcy petition was filed. But on the question as to the garnisher's proceeding against salary earned after the filing of the petition, Hand, D. J., said (pp. 900, 901): "Should I allow the creditors to levy on wages in fact earned in the future, they would recover upon a past debt from property earned subsequently. This contradicts the whole purpose of a discharge and I cannot permit it without violating the Act. It is not enough that in form the levy may be upon a single chose in action, consisting of the contract of employment. I concede that this is so, but the obligation is quite valueless till the bankrupt performs the condition of service to his employer. Therefore, for the purpose of this Act, I shall decide that the wages, which arise from services rendered after petition filed, is covered by the discharge and that the stay should continue as to that." In *Matter of Harrington,* 29 Am. Bank. Rep. 666, it appears that the levy was after the bankrupt's adjudication. Ray, D. J., said (p. 667): "but such execution and levy, if

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made within four months of the filing of a petition, would of course fall," citing section 67-f, Bankruptcy Act, *supra*. The creditor contended that under section 1391, *supra*, he was entitled to ten per cent of the bankrupt's salary down to the time that the creditor's judgment should be canceled, pursuant to the provision of section 150 of the Debtor and Creditor Law, this section providing in substance and effect that at any time after one year has elapsed since the bankrupt was discharged from his debts he may apply to the court in which judgment was rendered against him for an order directing the judgment to be canceled and discharged of record. Ray, D. J., said (pp. 668–670): "I do not think this contention can be sustained. The provisions of the Bankruptcy Act are paramount to State statutes. * * * All proceedings relate to the time of the adjudication. * * * If the discharge is granted, it relates back to the adjudication and releases the bankrupt from all liability on such debts as were provable in bankruptcy and existed at that time, due or not due, except such as are not affected by a discharge. * * * As the discharge in bankruptcy of Harrington relates back to the adjudication, August 13, 1912, and releases him from all liability on the judgment in question obtained August 7, 1912, and the debt represented thereby, it is immaterial that under the provisions of the statute of the State of New York he cannot secure a cancellation of record of such judgment until the expiration of one year after the granting of such discharge. The creditor cannot enforce it during that year against after-acquired property or wages earned after adjudication. * * * It is of course true that the judgment does not become an absolute nullity for all purposes until discharged of record. The Congress of the United States did not undertake to provide for the

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cancellation of judgments entered in the State courts on the granting of a discharge; but it has said, in substance, that the debt represented by this judgment is provable and dischargeable in bankruptcy, and that the debt and judgment cannot be enforced against the bankrupt or his property taken except in so far as it had been made a lien thereon more than four months prior to the adjudication." In *Matter of Obergfoll,* 38 Am. Bank. Rep. 645, the garnishee order was entered on February 18, 1915, the adjudication was on March 24, 1915, and the discharge on June 27, 1916. On April 15, 1915, the federal court directed the paymaster to withhold the salary deducted under the garnishee execution and to retain the same for twelve months from the date of adjudication or until the question of the bankrupt's discharge should be determined. Upon the bankrupt's discharge the federal court ordered the paymaster to pay over to the trustee in bankruptcy all money collected by him under the garnishee execution and in his hands, and that the trustee pay over therefrom to the bankrupt all deductions made since the date of the adjudication in bankruptcy. It was objected that the United States District Court had no power or right to interfere with the process issued out of the New York Supreme Court. Rogers, C. J., writing for the United States Circuit Court of Appeals, said (pp. 646–648): "In support of his contention he calls attention to the decisions of the Supreme Court of the United States declaring that when a court has taken into its custody property of any kind another court should not be permitted either to oust the possession of the first court, or in any way to interfere with its complete control and disposition of the property for the purpose of the cause in which its action has been invoked. That this principle has been laid down in a long line of cases cannot be

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denied. * * * The principle which these cases enunciate is fully recognized by this court and will be unhesitatingly applied in all proper cases. The difficulty is that the principle invoked has no application to such a case as that now before us. The order which the petitioner seeks to have reviewed was made under authority of section 67, subdivision f, of the Bankruptcy Act, which reads as follows: (quoting same, *supra*) * * * The order made by the New York Supreme Court on February 18, 1915, became a lien on that date. * * * The adjudication in bankruptcy was made on March 24, 1915, which was less than four months after the lien was created. Therefore the lien became null and void automatically by virtue of the provision of the Bankruptcy Act above quoted. The making of the order which the petitioner is here objecting to was no interference with the process of the Supreme Court of New York, as such process had been already annulled by the Bankruptcy Act, and there was nothing to interfere with when the order was made. * * * * If there could be any doubt in such cases the doubt has been extinguished by the decision of the Supreme Court in *Chicago, Burlington & Quincy R. R.* v. *Hall* (229 U. S., 511, 516, 30 Am. B. R. 619, 1913), where the court, speaking of a levy in a garnishee proceeding in a State court, declared that all levies, seizures and liens, obtained by legal proceedings within four months, that may or do interfere with that possession are annulled." The true rule is made clear in *Matter of Beck*, 38 Am. Bank. Rep. 797. In that case a motion was made to vacate or modify an order staying garnishment proceedings in the New York State court under section 1391 (*supra*). The judgment was obtained October 6, 1913. On October 21, 1913, execution was obtained under section 1391. On February 16, 1915, the petition in bankruptcy was filed. The city

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paymaster had been retaining the proper portion of the debtor's wages in the meanwhile. Hough, C. J., presented the question as follows (pp. 798, 799): "To whom does the money now in the hands of the city paymaster belong? Clearly no one but the trustee in bankruptcy can claim anything as against Bauer, the judgment creditor, and that trustee can claim nothing back of the four months' period which began October 16, 1914. * * * The moment any wages or salary became due to Beck, the execution applied to the proper proportion thereof. Whatever was retained by the city paymaster down to October 16, 1914, is clearly applicable to the payment of Bauer's judgment. What was retained after October 16, 1914, was just so much money practically in the hands of the sheriff under a levy made within the four months' period, for there could be no levy upon Beck's salary until there was a salary to levy upon. Therefore, the date of levy is coincident with the date of accruing wage. To such a situation *Clarke* v. *Larremore* (188 U. S. 486) * * * applies, and the trustee in bankruptcy is entitled to whatever the city paymaster has in his hand and retained from Beck's wages between October 16, 1914, and February 16, 1915. Beck has not yet obtained a discharge, nor does it appear whether he has applied for one; therefore, until he is discharged, or his right to apply for a discharge has expired, the doctrine of *In re Van Buren* (D. C., N. Y., 20 Am. B. R. 896, 164 Fed., 883) applies, and the city paymaster must continue to retain enough of Beck's still accruing salary, and retain it for the benefit of Bauer or of Beck as the case may be. *That is, if Beck gets a discharge, the debt is wiped out,* and if he does not get a discharge, Bauer's judgment may be satisfied out of wages earned after adjudication as well as before the four months' period. Of course, under no circumstances can the

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trustee claim anything accruing after adjudication. The stay order will therefore be lifted to the extent of authorizing the judgment creditor and the sheriff to obtain and pay over whatever was retained by the city paymaster prior to October 16, 1914. The trustee is instructed to demand the amount retained between October 16, 1914, and February 16, 1915. This will leave a deficiency upon Bauer's judgment, and the retention of wages must still continue until it appears whether Beck gets his discharge or not." In view of the foregoing authorities the motion of the defendant Regine Stern to vacate the order of May 16, 1917, must be granted, and the comptroller is directed to pay to her such moneys as he has withheld since June 1, 1917. As to the small sum withheld from defendant's salary under the garnishee order from its date to June 1, 1917, *quære*. Only the garnisher, the sheriff and the comptroller have been made parties to this motion. The trustee in bankruptcy, on behalf of the creditors, is also entitled to said sum. Under the circumstances it should remain in the hands of the comptroller until the trustee takes such steps as he may be advised. Settle order herein on two days' notice to the sheriff, so that in case he should claim and be entitled to poundage, under section 3307, subdivision 23 of the Code of Civil Procedure, his rights may be protected.

Ordered accordingly.

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ISAAC VORON, Plaintiff, *v.* SABBATIA CHAIT et al., Defendants.

(Supreme Court, New York Special Term, October, 1917.)

Referees — rights of — appointment of — fees — reference — estoppel — motion to vacate report of referee when granted.

The right of a referee appointed to take and state the accounts of the parties to an action, to fees, does not accrue until he has completed the reference and filed or delivered his report.

The conduct of such a referee in bargaining with the parties for his fees and demanding payment thereof in advance of the time when he is entitled to them tends to commercialize the administration of justice and to bring it into contempt and therefore cannot be tolerated.

Where it appears that when the referee received his third payment on account of his fees it was distinctly understood that he was not to ask for a further fee until his report was completed, but he did, and his request was refused, defendant, by his participation in the arrangements for the payment of the referee's fees, is not estopped from moving to vacate his report and the motion will be granted.

MOTION by plaintiff to confirm report of a referee and motion by defendant Chait for removal of referee and vacation of his report.

Grossfield Bros. (Alexander Thain, of counsel), for plaintiff.

Coss & Apfel, for defendants.

GREENBAUM, J. Plaintiff moves for the confirmation of the report of a referee who had been appointed to take and state the accounts of the parties, and at the same time the defendant Chait moves for the removal of the referee and the vacation of his report. The

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facts bearing upon the alleged misconduct of the referee will be briefly stated. At the opening of the reference, and before any testimony had been taken, the question of the referee's fees was discussed. The referee suggested that in view of the importance of the case he should receive a larger fee than ten dollars an hour, which was the amount proposed by counsel. Plaintiff's counsel asserts that he then suggested that the referee's fees could be paid from time to time out of a fund belonging to the defendant Voron & Chait, Inc., in which both parties were interested. On the other hand, the defendant claims that plaintiff's counsel remained mute when the request for increased fees was made and put the burden upon him to make objections thereto. Without now passing upon this disputed question of fact, the stenographer's minutes disclose a stipulation to the following effect: "It is stipulated that the referee's fees shall be $10 per hour for all time necessarily spent in the business of the reference and $10 for each adjournment, * * * the fees in the first instance to be paid out of the funds of the corporation and determined later which of the parties, if any, shall be charged with them." It will be observed the stipulation does not state that the referee's fees were to be paid from time to time during the progress of the reference. The evidence, however, undisputably shows that three payments aggregating $1,000 were in fact paid to the referee during the course of the reference on account of his fees upon the consent of all the parties. The first payment was made pursuant to a request embodied in a letter from the referee addressed to plaintiff's attorneys under date of May 24, 1915, in which he states: "Will you kindly arrange to let me have $300 on account of my services as referee in the Voron v. Chait matter?" After the receipt of this

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initial payment the referee wrote a letter to the defendants' counsel under date of July 28, 1915, in which he said: "Following the intimation of counsel, I shall be pleased to receive a check for $400 on account of my services as referee in the above matter." The payment was made as requested. It cannot be doubted that the "intimation of counsel" did not emanate from defendants' counsel. On August 26, 1915, the referee wrote a letter to defendants' attorneys, in which he stated: "Will you kindly have your client sign a check to my order for $300 on account of fees due me as referee in the above entitled matter and pursuant to stipulation herein?" A check for $300 was thereafter forwarded to the referee inclosed in a letter from defendants' attorneys, dated September 27, 1915, which reads as follows: "We inclose herewith the check of Voron & Chait, Inc., to your order for $300 for fees in this matter as requested. As the bank account of the corporation is getting low, and as there are other claims, we are sending this check on the understanding that you will not ask further fees until the time comes to take up the report in this matter, which, as we recall, you kindly stated was satisfactory to you." After the acceptance of the check upon the ostensible "understanding" expressed in this letter, the referee wrote a letter, under date of November 29, 1915, addressed to both attorneys, in which he stated: "I would appreciate it if you could arrange to let me have a check for $300 on account of my fees in the above entitled matter. Trusting to hear from you, I remain," etc. Defendants refused to comply with this request. Subsequently the referee prepared his report. In addition to the foregoing facts the moving papers of defendants set forth alleged acts of unfairness and bias towards the defendants' counsel. These allegations are denied.

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It is unnecessary to determine whether these charges have merit in view of the conclusions reached by the court. The Appellate Division of this department has recently held in *Ament* v. *Schubert Piano Co.*, 172 App. Div. 423, Page, J., writing: "The demanding and receiving his (referee's) fees prior to the completion of his decision was even more reprehensible. It is well settled that under ordinary circumstances a referee's right to his fees does not accrue until he has completed the reference and filed or delivered his report. (*Hebard* v. *City of New York*, 137 App. Div. 752.) He should not have requested nor accepted payment so long as there remained any duty of a judicial nature for him to perform." Under our conception of the relation of the judge to the litigants the court cannot for a moment tolerate the conduct of a referee bargaining for fees with the parties to the action on trial before him and demanding payment therefor in advance of the time when he is entitled to them. Such conduct tends to commercialize the administration of justice and to bring it into contempt. It also tends to degrade the legal profession in encouraging counsel to curry favor with the referee by the suggestion of enlarged fees or a ready acquiescence in the requests of the referee in that behalf. The plaintiff, however, insists that the defendant is estopped from moving to vacate the report by reason of his participation in the arrangement for the payment of the referee's fees. It doubtless was the duty of counsel to refuse to proceed with the reference under the conditions here disclosed and promptly to apply to the court for the removal of the referee. And it is ordinarily true that one who has sought to benefit by his own improper acts should not be relieved from the adverse consequences that may result therefrom. But it seems to me that the maintenance of the purity

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and integrity of courts of justice forbids the application of the doctrine of estoppel in a case like this. The interests of the public in the administration of justice transcend those of the parties who helped to create an intolerable situation, for which they themselves are to blame. But even if it be assumed that the rule of estoppel were applicable to parties who have acquiesced in improper requests of a referee, it seems to me that the facts here established would exclude the application of the rule. It appears that when the referee received his third payment it was distinctly understood that he was not to ask for a further fee until his report was completed. Notwithstanding this he made a request before his report was filed for a fee, which was refused. In the dissenting opinion in *Oakley* v. *Aspinwall,* 3 N. Y. 561, it was said: "If the counsel was not estopped by the law of the land from making such a motion, he must allow me to say, that the laws of honor and decency forbid it." That, however, was a case in which a motion was made to set aside a judgment upon the ground that one of the judges who participated in hearing an appeal was disqualified by statute from sitting therein by reason of his consanguinity to one of the parties, although all the parties knew of his disqualification and expressly solicited him to act. The majority opinion of the court in effect held that jurisdiction could not be conferred even upon consent. It is thus evident that the minority opinion had reference to a situation in which the decision of the judge who sat was not open to the suggestion of even unconscious bias and in which there was no element involving judicial impropriety or misconduct. The defendants refused to comply with the referee's request for a further advance payment of fees. It is therefore difficult to say whether the referee may not have been

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unconsciously influenced against them because of their refusal to comply with his request. It has been repeatedly held that it is not necessarily to be assumed that a referee has been influenced in his decision adversely to the party who demurred or objected to a referee's request. The test is, may the fairness of his decision be doubted in view of his misconduct or indiscretion? *Reynolds* v. *Moore*, 1 App. Div. 105; *Dickinson* v. *Earle*, 63 id 134; *Smith v. Dunn*, 94 id. 429. The court deeply regrets to be obliged to set aside a report based upon upwards of two thousand pages of testimony and in which large sums have already been expended for referee's and stenographer's fees, but the parties by their own acts have created a condition which leaves no alternative but to set aside the report. It may be proper to add that in granting this motion the court does not intend to intimate that the findings of the referee are not justified. They have simply not been passed upon.

Ordered accordingly.

PHILIP GOLDBERG and MAX MILSTEIN, Plaintiffs, *v.* ALFRED W. NOREK, Defendant.

(Supreme Court, Kings Special Term for Trials, October, 1917.)

Mortgages — "usual" clauses — statutes.

Specific performance — contracts — title — actions — pleading — judgments — mortgages — evidence.

Whether a clause in a mortgage is "usual" is a question of fact the determination of which depends upon whether it has been in general use, not whether it has a certain legal effect or even whether it conforms to any statute.

At the time of closing title under a land contract which required the vendees to give a mortgage containing the usual sec-

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ond mortgage clauses and conditions, they objected to a number of the clauses, and claiming that defendant would not perform the contract brought an action to impress a lien on the property for the down payment and for their expenses, and the defendant denying a failure on his part to perform the contract counterclaimed for a specific performance thereof. Upon the trial plaintiffs insisted that clauses in the mortgage requiring the mortgagor upon request to certify the amount due on the mortgage and providing in case of foreclosure for the appointment of a receiver without notice, and the assignment of the rents, were unusual, but the court found upon uncontradicted evidence that said clauses were in fact the usual clauses and conditions found in second mortgages. *Held*, that the complaint should be dismissed and defendant given judgment for the specific performance of the contract.

ACTION to impress a lien on real property.

Meyer D. Siegel, for plaintiffs.

H. S. & C. G. Bachrach, for defendant.

CROPSEY, J. The vendees under a contract to purchase real property sue to impress a lien for the sum paid on account and for their expenses, claiming the defendant would not perform. The defendant denies any failure on his part and counterclaims for a judgment of specific performance. The differences between the parties are two-fold. The plaintiffs claim the defendant insisted upon the execution of a mortgage containing clauses not called for by the contract, and that there was a warranty in the contract as to the rents of the property which was untrue.

The contract required the purchasers to execute a mortgage containing the "usual second mortgage clauses and conditions." At the time of closing the plaintiffs objected to a number of the clauses in the mortgage. Some of these the defendant then offered

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to withdraw. On the trial the plaintiffs withdrew some of their claims but strenuously insisted that some of the clauses were unusual, and especially those requiring the mortgagor upon request to certify the amount due on the mortgage, and providing in the event of a foreclosure for the appointment of a receiver without notice, and the assignment of the rents.

The plaintiffs in their brief submitted after the trial for the first time claim that other clauses were unusual, but they will not be discussed for no such claim was made at the time set for closing nor was it made upon the trial.

The defendant proved that the clauses in dispute were in fact the usual clauses and conditions found in second mortgages. The plaintiffs offered no evidence to the contrary. So the court found the fact to be as shown by the proof.

Nothwithstanding the finding of fact announced by the court at the close of the trial, that all the disputed clauses were usual, the plaintiffs' counsel urges that the conclusion of law must be that they are unusual. This contention seems so exceptional that it probably could and would have been readily rejected but for a decision of the Court of Appeals, which it is thought makes it desirable to write this opinion. In *Elterman* v. *Hyman,* 192 N. Y. 113, a clause assigning rents similar in effect to the one in the instant case was held to be unusual " as matter of law " (p. 117). The court added that the clause " if not entirely unprecedented, is certainly unusual." The clause requiring the mortgagor to state the amount due was also held unusual but the record shows that had been so held as matter of fact (p. 115), though there was a general finding of fact that none of the clauses was unusual (p. 114).

Whether a clause is " usual " is a question of fact. Its determination depends upon whether it has been

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in general use. It is not a question of whether the clause has a certain legal effect or even whether it conforms to any statutory provision. If it was, it should be decided as a question of law. But whether it is in general use cannot be a question of law — that is plainly a question of fact to be determined upon the evidence introduced. And being found as a fact to be "usual," it is not apparent how the conclusion of law can follow adjudging it to be "unusual." The legal conclusion must be predicated upon the facts as found.

That some of the clauses in question are not contained in the statute as recently amended (Laws of 1917, chaps. 681, 682) or as it was prior thereto (Real Prop. Law, §§ 254, 258) is not controlling. The statute has always been merely permissive, and there is no provision that conveyances must be in the form set forth. The statute "does not prevent or invalidate the use of other forms." § 258. If the contract called for the clauses specified in the statute the result might be different. The determination of whether a clause is "usual" is not made by seeing if it is contained in the statute but by finding out if it actually is in general use. And it may well be "usual" although not in the statute.

There is no warranty as to the rents in the contract. The property was to be conveyed subject to certain leases "marked Nos. 1 to 20 inclusive, rentals aggregating $580 per month." Sixteen of these twenty leases were produced before the contract was signed and were examined by the buyer's attorney and initialed by him. When the time for closing came, the buyers asserted that some of the sixteen leases mentioned contained a provision allowing a short period of tenancy without paying rent, and so they claimed the rentals were not $580 a month. No fraud is

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claimed. No claim is made relating to the four leases which were not produced. The others showed on their face whatever period there was to be, for which rent could not be demanded. The contract did not state the term of any of the leases except that it was "not exceeding one year." They might have run for only a month or less. The reference to the rentals was merely to the rate per month. The exhibition, examination and identification of the leases show conclusively that there was no warranty intended by the reference in question and none was in fact made.

The complaint must be dismissed and the defendant have judgment on his counterclaim for specific performance, with the costs of the action.

Judgment accordingly.

CITY OF NEW YORK, Plaintiff, *v.* WILLIAM H. NUNEZ, ELIZABETH POLLOCK, WILLIAM POLLOCK, WILLIAM HENNESSY, CHARLES BROWN, ANNA SCHAEFFER, FREDERICK BLANK, and "MARY" BLANK, his Wife, the said name "Mary" Being Fictitious, the First True or Given Name of said Defendant Being Unknown to the Plaintiff, Defendants.

(Supreme Court, Kings Trial Term, October, 1917.)

Ejectment — action of — perfecting title under tax sale — deeds — evidence — taxes — Tax Law, § 132.

Where in an action of ejectment the dispute relates only to a particular portion of the property described in the complaint, to which defendant claims title through a state tax sale held in 1895 at which time the property was sold to the people of the state, and it appears that thereafter it was conveyed to one who in turn deeded it to another of whom the defendant was the sole heir, and the uncontradicted proof shows that in the month of December in the years 1896 and 1897 the property

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was occupied by several persons, but that the statutory notice to redeem within six months was served only on one of them, the title under the tax sale was not perfected and the limitation in section 132 of the Tax Law does not apply.

The comptroller's deed of lands sold for unpaid taxes is not conclusive as to the service of all notices required to be given relating to the sale of such lands, nor is his certificate conclusive as to the service of the statutory notice to redeem upon the occupant of said lands.

ACTION of ejectment.

Lamar Hardy, corporation counsel (John B. Shanahan and Thomas F. Magner, of counsel), for plaintiff.

Arthur C. Good (Francis J. Byrne, of counsel), for defendant Nunez.

Charles J. Ryan, for defendants William and Elizabeth Pollock.

CROPSEY, J. This is an action of ejectment. At the commencement of the trial the parties stipulated that if there was any question of fact in the case it was merely whether the premises in question were occupied in December, 1896, and in December, 1897, by any person other than J. Henry. After all the evidence was in the uncontradicted proof showed that there were other occupants than J. Henry at the times in question and the court thereupon directed the jury to answer the questions which had been agreed upon, in accordance with the proof. The decision on the questions of law was reserved.

Plaintiff proved its title through grants from the governors of the colony of New York. The property is part of the common lands of the former town of Gravesend which originally were under the management and control of trustees appointed pursuant to

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chapter 92, Laws of 1880. Upon the annexation of Gravesend to the former city of Brooklyn, title to this property passed to the latter (Laws of 1894, chap. 449, § 3), and by the creation of the Greater City of New York passed to the plaintiff. The dispute in the title relates only to the southerly 110 feet of the piece described in the complaint. The defendant Nunez claims title to this through a tax sale held in 1895 at which the property was sold to the People of the State of New York. Later and in 1901 the state deeded it to Charles C. Overton and during the same year he deeded it to Elizabeth Nunez of whom the defendant Nunez is the sole heir.

The question of law that is raised involves the effect of the certificate of the state comptroller certifying that a notice to redeem had been served on the occupant of the property in question and whether the bringing of this action is barred by the limitations imposed by the Tax Law.

The statute requires that if the property sold is occupied a notice must be served upon the occupant notifying him of the sale and requiring him to redeem within six months. There is no proof that such a notice was served on any one except as that may be shown by an affidavit filed in the state comptroller's office stating that it was served on J. Henry. The uncontradicted proof shows, as has been stated, that there were other occupants than J. Henry at the time in question and there is no claim that any notice was served on them. Service of the notice on all the occupants is essential. *People* v. *Ladew*, 189 N. Y. 355–359; *Ostrander* v. *Reis*, 206 id. 448. If the notice is not served the title is not perfected, and the limitation in section 132 of the Tax Law of 1896 (Chap. 908) does not apply. *Matter of Rourke*, 63 Misc. Rep. 354; affd., 139 App. Div. 155; affd., 202 N. Y. 604; *Cary* v. *Given*,

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144 App. Div. 221–224. All the occupants must be served, that is, every one who has lawfully entered upon any part of the lands and is in possession of the same to the exclusion of every other person. Laws of 1896, chap. 908, § 134.

The defendants' claim that the comptroller's deed is conclusive as to the service of all notices required to be given is not supported either by the statute or the authorities. Within one year after the last day of the sale the property may be redeemed. Tax Law of 1896, § 127. The deed cannot be executed by the comptroller until after the expiration of that year. § 131. After the deed shall have been recorded for two years after the expiration of the year allowed for redemption it "shall be conclusive evidence that the sale and proceedings prior thereto * * * and all notices required by law to be given previous to the expiration of the time allowed for redemption, were regular and were regularly given, published and served according to the provisions of all laws." § 132. This section plainly has no reference to the additional period allowed for redemption when the property sold is occupied. The period of redemption referred to is the one-year period that immediately follows the sale. The following section of the act providing for the giving of notice to occupants refers to the year following the sale as the period for redemption and requires the notice to occupants to be given after that year has expired and within the following year. § 134. This section further provides that the notice to occupants is not to be given until after the comptroller's deed has been delivered. Hence the fact that the deed had been recorded for two years could not be conclusive evidence of the service of any notices which the law required should be given after the deed was delivered. *Caulkins* v. *Chamberlain*, 37 Hun, 163–165.

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Nor is the certificate of the comptroller as to the service of the notice upon the occupant conclusive. Section 135 provides that within one month after the service of such a notice the grantee in order to complete his title shall file with the comptroller a copy of the notice, with the affidavit of a person, certified as credible, that the notice was duly served. "If the comptroller shall be satisfied that the proper notice has been duly served, and if the moneys required for the redemption of such land shall not have been paid within the six months, he shall under his hand and official seal, certify such facts, and the conveyance before made shall thereupon become absolute and the occupant and all others interested in such lands shall be forever barred from all right and title thereto." Where the property is occupied the deed cannot be recorded until the notice to the occupant has been given and the six months' period within which he is permitted to redeem has expired. § 134. The provision quoted from section 135 means that the deed becomes absolute only after the notice has in fact been given and the other requirements of the statute complied with.

Under defendants' contention the actual service of the notice is unnecessary so long as the comptroller certified that it had been served. There is nothing in the statute to justify such a construction. The actual service of the notice is essential. The certificate of the comptroller is also necessary but it does not dispense with the service. The statute does not make the certificate of the comptroller even *prima facie* evidence of the service of the notice. The legislature could have so provided but it did not. The requirement that the affidavit of service shall be filed does not make it competent evidence of the fact of the service. *People ex rel. Vogler* v. *Walsh*, 87 N. Y. 481–484, 485. Unless in

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fact the notice was given the certificate of the comptroller serves no purpose. No act of misconduct by a public official can prevent the redemption of property from a tax sale. *Van Benthuysen* v. *Sawyer,* 36 N. Y. 150; *People ex rel. Cooper* v. *Registrar of Arrears,* 114 id. 19; *Wallace* v. *McEchron,* 176 id. 424–427. To give the certificate of the comptroller effect as a finality, regardless of whether the prescribed notice had been given, would be to deprive the occupant of any rights he might have in the property without due process of law. "Every requisite of the statute, strictly construed, having a semblance of benefit to the owner, must be complied with, if not strictly, at least substantially." *People ex rel. National Park Bank* v. *Metz,* 141 App. Div. 604. The comptroller's certificate is certainly not conclusive proof of the service even if it is any proof of it. *Caulkins* v. *Chamberlain,* 37 Hun, 163; *Hennessey* v. *Volkening,* 30 Abb. N. C. 100, 114–119.

In the instant case the uncontradicted proof shows that there were several occupants of different parts of the property. So even if the notice was served on J. Henry the statute was not complied with for the service upon the other occupants was equally essential. These views are not in conflict with *Halsted* v. *Silberstein,* 196 N. Y. 1. The court evidently did not consider the comptroller's certificate conclusive (p. 9). The trial court there found that the notice had been in fact served upon the only occupant and that finding had been unanimously affirmed by the Appellate Division.

Even if the affidavit of service filed with the comptroller is good as proof of the service it cannot be of any effect to show that the affiant could not ascertain that there were any other occupants. The statute does not require such a statement to be contained in

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the affidavit. That statement is not the statement of a fact. Nor does it disclose the source of the affiant's information.

In view of the decision that has been reached it is unnecessary to consider whether the act would be constitutional if it made the comptroller's certificate conclusive proof of the service.

The plaintiff raises some other questions which it is deemed unnecessary to consider. It may be noted, however, in passing that the plaintiff's claim that the deeds from the state to Overton and from Overton to Nunez are champertous under section 225 of the Real Property Law of 1896 is not answered by the case of *People* v. *Turner*, 145 N. Y. 451–461. The statute involved in that case was the Forest Preserve Act (Laws of 1885, chap. 283), and under its provisions the possession of the state was deemed to be actual. That act, however, applies only to lands in certain specified counties and does not affect lands in the county of Kings.

Nor do the provisions of section 133 of the Tax Law of 1896 answer the plaintiff's contention. They relate only to "wild, vacant and forest lands to which the state holds title" and which after the prescribed advertising are deemed to be "in the actual possession of the comptroller."

The plaintiff is entitled to judgment. If there is any difference of opinion as to whether the verdict of the jury directed by the court shall be deemed a general or a special verdict or whether findings should be made the question can be presented on the settlement of the papers, notice of which should be given.

Judgment accordingly.

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GENERAL BAKING COMPANY, Plaintiff, v. HORATIO N. DANIELL, Defendant.

(Supreme Court, Erie Special Term, October, 1917.)

Venue — when motion to change denied — corporations — residence — actions — Code Civ. Pro. § 984.

Under section 984 of the Code of Civil Procedure a corporation may be deemed to have a residence where it owns property and actually transacts a substantial part of its business and its residence is not confined to the county where its certificate of incorporation is filed.

Where plaintiff, a corporation having its principal office in the city of New York, where it owns a plant for baking, also owns and operates three bakeries in the city of Buffalo, N. Y., with about 300 employees, and all its business in the western part of the state, including the county of defendant's residence, is carried on from the city of Buffalo, defendant's motion to change the place of trial from Erie county to Tioga county, where he resides, in an action to recover a balance due for baked goods shipped to him from Buffalo, will be denied.

MOTION by defendant to change place of trial from Erie to Tioga county, on the ground that Erie is not the proper county.

Frederick E. Hawkes, for motion.

Horton & Grandison, opposed.

WHEELER, J. The defendant lives in Tioga county. The plaintiff is a corporation, and by its certificate of incorporation its principal office is stated to be in the city of New York. The affidavits submitted show that although the principal business office of the plaintiff is as stated, and it owns a plant for baking in New York city, it also owns and operates three other bakeries in

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the city of Buffalo, Erie county, including land, buildings and equipment, which have an assessed valuation of $285,995; that in these bakeries it employs 300 men and women, and that all business of the company in the western part of the state (including Tioga county) is carried on from the city of Buffalo, and that the cause of action set forth in the complaint is for a balance alleged to be due for baked goods shipped the defendant from Buffalo.

The defendant contends that under the provisions of section 984 of the Code of Civil Procedure he has the right to have the place of trial changed to Tioga county as the *proper* county, it being contended that Erie county is not the legal residence of either party to the action.

The plaintiff, however, insists that under the facts shown the plaintiff, for the purposes of motions of this character, must be deemed to have a residence in Erie county. The plaintiff very properly, we think, argues that in determining the place of trial, *residence,* as distinguished from legal domicile, is the determining fact (*Lyon* v. *Lyon,* 30 Hun, 455; *Cincinnati, H. & D. R. Co.* v. *Ives,* 21 N. Y. St. Repr. 67; *Bischoff* v. *Bischoff,* 88 App. Div. 126); and that when we come to consider the case of corporations, a corporation may, in a sense, have several places of residence, as in case of railroads, where it is held by a long line of decisions that such a railroad will be deemed to have a residence in each county of the state through which it operates. *Polley* v. *Lehigh Valley R. R. Co.,* 138 App. Div. 636; affd., 200 N. Y. 586; *Poland* v. *United Traction Co.,* 88 App. Div. 281; affd., 177 N. Y. 557; *English* v. *New York, N. H. & H. R. R. Co.,* 161 App. Div. 834; *Pond* v. *Hudson R. R. R. Co.,* 17 How. Pr. 543; *Buffalo & State Line R. R. Co.* v. *Supervisors of Erie Co.,* 48 N. Y. 93.

It is not true that the legal residence of a cor-

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poration is confined to the locality of its principal office of business. Strictly speaking a corporation can have no local residence or habitation. Created by law, and known by the legal capacities conferred upon it, it exists only in the recognition of the rights and franchises which it may claim. Wherever the law is recognized from which its franchises are derived, there it exists. It extends to the territorial limits of the jurisdiction which granted its charter; having no material, visible existence, except in the property it may claim, it is represented by that.

In the case last cited the court said, at pages 103, 104: "The residence of a company is most obviously where it is actively present in the operations of its enterprise. It will thus be seen that while corporations, in their general aspect, are mere ideal existences, without body or soul, yet they will be considered inhabitants, residents, citizens, when the general spirit and purpose of the law require it * * *.

"What then determines the location or residence of a corporation within this State? * * * In the absence of such provisions, its nature, character and mode of operation must determine this. * * * A corporation, for many purposes lives, moves and has its being in its agents, and wherever they are in possession of its real estate, carrying on its corporate business, it may be supposed to exist and reside, without departing from legal precedence or violating the spirit or letter of the law."

On the other hand, there will be found in the reports cases holding that in motions of this character the principal place of business, as fixed in the articles of association, is to be deemed the residence of the corporation. Among such decisions are the cases of: *Rossie Iron Works* v. *Westbrook*, 59 Hun, 345; *Speare* v. *Troy Laundry Mach. Co.*, 44 App. Div. 390; *Reming-*

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ton & Sherman Co. v. *Niagara Bank,* 54 id. 358; *Rector* v. *Ridgwood Ice Co.,* 38 Hun, 293; *Poland* v. *United Traction Co.,* 88 App. Div. 282.

In none of these cases, however, so far as I am able to discover, were the facts presented such as are shown on this motion. In the cases cited, so far as I can gather from the opinions, the places of business and the ownership of property coincided with the place named as the principal place of business in the certificate of incorporation. We think all the cases above cited were properly decided on the facts as presented in each case, and there is nothing in any of them controlling on the court in disposing of the motion now before this court.

We think the better doctrine is to hold that, for the purposes of determining the place of residence of a corporation, under section 984 of the Code of Civil Procedure, a corporation may be deemed to have a residence where it owns property and actually transacts a substantial part of its business, and its residence is not confined to the county where its certificate of incorporation is filed.

The question presented is a practical one, and one of policy. Any different holding would lead to hardship, and actual injustice in many cases.

In disposing of this motion, we have eliminated from our consideration all questions as to the convenience of witnesses, as we think the sole question presented is whether Erie county is the proper county.

The defendant's motion is denied, without costs of motion.

Motion denied, without costs.

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Matter of the Estate of LUCY B. TROUGHTON, Deceased.

(Surrogate's Court, New York County, October, 1917.)

Referee — report — what should state on margin of — surrogates.

A surrogate's referee should separately state his findings of fact and conclusions of law and note on the margin of his report his disposition of requests to find.

MOTION to remit to a referee his report.

Marsh & Wever (Charles Capron Marsh, of counsel), for executor and trustee.

Merritt E. Haviland, for contestants Eliza M. Beard et al.

FOWLER, S. This is a motion to remit to a referee his report for the purpose of separately stating his findings of fact and conclusions of law and for the purpose of requiring him to note on the margin of the requests to find his disposition thereof. Although the referee has not separately entitled the findings of fact and conclusions of law, an examination of the report shows that such findings and conclusions are separately stated and numbered and, in my opinion, comply with section 1023 of the Code of Civil Procedure.

As to the second point, the question is whether section 2541 of the Code of Civil Procedure, which authorizes a surrogate to dispense with findings, applies to a surrogate's referee. In my opinion section 2541 of the Code of Civil Procedure does not abrogate the provisions of section 1023 of the Code of Civil Procedure (made applicable to surrogates'

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courts by sections 2536 and 2770 of the Code of Civil Procedure), in regard to the duty of a referee appointed by the surrogate to pass upon particular questions submitted. The motion to remit the referee's report should be granted to the extent of requiring the referee to note on the margin of the statement of requests to find the manner in which each proposition has been disposed of.

Decreed accordingly.

Matter of Estate of FRANCISCO GARCIA, Deceased.

(Surrogate's Court, New York County, October, 1917.)

Trusts — deeds of — wills — who entitled to corpus of trust fund — transfer tax.

Decedent executed a deed of trust by which he transferred a certain sum to the trustees to pay the income to him during his life, and if his wife survived him to pay the principal to her within thirty days after his death, but if she died before payment was actually made then to pay the principal to such persons as she designated in her will, and if she died intestate to pay the principal to his executors as part of his residuary estate; if his wife died during his lifetime then to pay the principal to him.

Held, that so far as any act of the donor was concerned the deed of trust was irrevocable and his wife having survived him more than thirty days became absolutely entitled to the *corpus* of the trust fund as of the date of the execution of the trust deed, her right of possession being deferred until his death.

That the value of the *corpus* of the trust fund for the purpose of a transfer tax should be taken as of the date of decedent's death and that the property transferred by said deed of trust should not be added to the value of the property transferred to decedent's wife under his will.

APPEAL from an order fixing the transfer tax.

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Goldsmith, Cohen & Weiss (Robert E. Samuels, of counsel), for executor.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for State Comptroller.

FOWLER, S. The principal questions presented by the appeal of the executors are: *First.* Is the *corpus* of a trust fund created by a deed of trust executed by the decedent taxable in this proceeding? *Second.* If the fund is taxable, should its value be ascertained as of the date of the deed of trust or of the date of decedent's death? *Third.* For the purpose of determining the rate of taxation, should the value of the trust fund be added to the value of the legacy given to the donee by the will of the decedent? *Fourth.* Should trustees' commissions be deducted from the value of the *corpus* of the trust fund?

The transfer tax appraiser found the value of the trust fund as of the date of decedent's death and added it to the value of the legacy given to the widow in the will of the decedent, and from the order entered on his report the executors have appealed.

On the 4th of January, 1912, Francisco Garcia executed a deed of trust by which he transferred to the trustees therein named the sum of $100,000 to pay the income to him during his life, and if his wife survived him to pay the principal to her within thirty days after his death, but if she died before payment was actually made then to pay the principal to such persons as she designated in her will, and, if she died intestate, to pay the principal to his executors as part of his residuary estate; if his wife died during his lifetime, then to pay the principal to him.

It seems to be established by the decisions of the courts of this state that if a donor reserves to himself

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the power to revoke the deed of trust, the transfer of the property constituting the *corpus* of the trust fund does not take place until his death, and its value for the purposes of the transfer tax is ascertained as of that date. *Matter of Dwight,* N. Y. L. J. Oct. 8, 1911; affd., 149 App. Div. 912; *Matter of Webber,* 151 id. 539; *Matter of Dana Co.,* 215 N. Y. 461. In the matter under consideration, however, the donor did not reserve to himself any power of revocation. It is true that in the event of his wife predeceasing him he had the right to regain possession of the *corpus* of the trust fund and thus effectually revoke the deed of trust, but this right was not dependent upon the exercise of his will or discretion. As far as any act of the donor was concerned the deed was irrevocable, and the right of the widow to the *corpus* of the trust fund became fixed on the date when the deed was executed, subject, however, to be divested by her death before the donor or within thirty days thereafter. She survived him more than thirty days, and therefore became absolutely entitled to the *corpus* of the trust fund. As to the widow, therefore, the transfer was effected at the date of the execution of the trust deed, but the right of possession was deferred until the death of the donor. While technically it is the value of the property at the date of transfer which is subject to a transfer tax, and the value of a remainder transferred by a deed of trust should be ascertained by the state superintendent of insurance in accordance with the provisions of section 230 of the Tax Law, in practice it will be found more equitable to impose a tax upon the value of the *corpus* of the trust fund as of the date of the donor's death. As I had occasion to point out in *Matter of Meserole,* 98 Misc. Rep. 105, if the donee of a trust fund insists upon its value being ascertained as of the date of the trust deed, then the state

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has the right to insist upon payment of the tax within eighteen months after that date, and to a penalty of ten per cent if such payment is not made. Therefore the value of the property at the date when the donee becomes entitled to its possession is a fair basis of valuation for both the donee and the state. I will therefore hold that the appraiser was correct in appraising the trust fund at its value on the date of decedent's death.

The third point raised by the executors, namely, whether the value of the *corpus* of the trust fund which was transferred to the widow of decedent by the deed of trust should be added to the value of the legacy given to her in the will of the decedent, is based upon facts similar to those presented as one of the grounds of appeal in *Matter of Meserole, supra,* and for the reasons stated in my opinion in that matter I will hold that the property transferred by the deed of trust should not be added to the value of the property transferred to her under the will of the decedent, but should be taxed under the provisions of the Tax Law in force at the date of the execution of the deed of trust. The appeal on this point is sustained.

The trustees are entitled to commissions upon the *corpus* of the trust fund, and such commissions should be deducted from the value of the fund in ascertaining its value for the purpose of taxation. The appraiser therefore erred in failing to deduct trustees' commissions from the value of the trust fund.

The order fixing tax will be reversed and the appraiser's report remitted to him for correction as indicated.

Order reversed.

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Misc.] Surrogate's Court, New York County, October, 1917.

Matter of the Estate of LAURA NORTH RICHARDS, Deceased.

(Surrogate's Court, New York County, October, 1917.)

Transfer tax — what not subject to — taxes — mortgages — corporations — domicile — decedents' estates — Laws of 1915, chap. 664, § 220, as amended.

The amendment (Laws of 1915, chap. 664) to section 220 of the Tax Law, which provides for the imposition of a tax upon the transfer "of any intangible property," etc., does not apply to bonds executed by an individual and such bonds and mortgages whether located in this state or in the state of a decedent's domicile are not subject to a transfer tax in this state.

A bond and mortgage given by a corporation on its real estate in this state as part consideration of the purchase price thereof, or for money loaned to the corporation, owned by a non-resident decedent at the time of her death, is not subject to a transfer tax here.

APPEAL from an order fixing the transfer tax.

Otto C. Wierum, Jr., for executor.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for State Comptroller.

FOWLER, S. The transfer tax appraiser reported that four bonds and mortgages aggregating $11,327.25, owned by the decedent at the time of her death, were subject to a transfer tax in this state, and the executor has appealed from the order entered on the appraiser's report.

The decedent, who was a resident of California, died on the 9th day of April, 1917, She owned no tangible personal property within this state, but she had in her possession in California a bond and mort-

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gage executed by the Citizens' Union Realty and Mortgage Company upon property situated in the borough of Brooklyn, city of New York, for the sum of $3,500, a bond and mortgage executed by the Jessamine Realty Company upon property situated in the borough of Brooklyn, city of New York, for the sum of $4,000; a bond and mortgage executed by the Church Realty Company upon property situated in the borough of Brooklyn, city of New York, for the sum of $3,000. She was also the owner of a bond and mortgage for $700, executed by the Malba Estates Corporation upon property situated in the borough of Queens, city of New York, but this bond and mortgage was located in New York state at the date of her death.

The state comptroller contends that these bonds and mortgages are taxable in this state because of the amendment of section 220 of the Tax Law, effected by chapter 664 of the Laws of 1915. That amendment provided for the imposition of a tax upon the transfer "of any intangible property, if evidenced by or consisting of shares of stock, bonds, notes or other evidences of interest in any corporation, * * * wherever incorporated or organized except * * * a moneyed corporation, a railroad or transportation corporation, or a * * * manufacturing corporation * * * and the property represented by such shares of stock, bonds, notes or other evidences of interest consists of real property which is located, wholly or partly, within the state of New York * * * in such proportion as the value of the real property of such corporation * * * located in the state of New York bears to the value of the entire property of such corporation * * * and the decedent was a non-resident of the state at the time of his death."

Under section 243 of the Tax Law, bonds are

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expressly included in the definition of intangible property. The amendment above quoted does not apply to bonds executed by an individual. Such bonds and mortgages, whether located in this state or in the state of a decedent's domicile, are not subject to a transfer tax in this state. Neither are the bonds of a moneyed corporation, a railroad corporation, or a manufacturing corporation subject to a transfer tax if owned by a non-resident. Real estate corporations and a few other classes of corporations seem to be the only ones affected by the amendment. Whether the legislature has the power to make such a discrimination is a question that is not raised by the appeal of the executor, and in view of the conclusion at which I have arrived concerning the amendment above referred to it is unnecessary to inquire whether the state of New York can tax bonds that are owned by a non-resident and that are physically located outside of the state at the date of such non-resident's death. *Matter of Fearing,* 200 N. Y. 340. I am inclined to think that the amendment was intended to apply to bonds issued by certain corporations in accordance with the provisions of section 6 and section 55 of the Stock Corporation Law, and that it was not intended to apply to a bond and mortgage given by a corporation to an individual to secure payment of money loaned to the corporation. The direction in the statute that such bonds shall be taxable in the proportion that the real estate affected by them bears to the entire property of the corporation seems to sustain this conclusion, as it could have no application to bonds and mortgages given by a corporation on its real estate in this state to an individual as part of the consideration for the purchase price of such real estate, or for money loaned to the corporation. I will therefore hold that the bonds and mortgages owned by

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the decedent at the time of her death and described in the appraiser's report are not subject to a transfer tax in this state.

The order fixing tax will be reversed, and an order may be entered on notice exempting the estate of the decedent from taxation in this state.

Order reversed.

NELLIE MINERS, Appellant, *v.* MAX AUSFRESSER and HYMAN FIELDER, Respondents.

(Supreme Court, Appellate Term, First Department, October, 1917.)

Negligence — action for personal injuries — evidence — new trial.

Where plaintiff in an action to recover for personal injuries, based on negligence, testified that while passing along the sidewalk in front of defendant's premises she stepped on something and then fell into the coal-hole and that when she looked the cover was about two feet away, the doctrine of *res ipsa loquitur* applies, and a judgment dismissing the complaint at the close of plaintiff's case will be reversed and a new trial granted.

APPEAL by plaintiff from a judgment of the City Court of the city of New York dismissing the complaint at the close of plaintiff's case, and from an order denying plaintiff's motion for a new trial.

Samuel Jesse Buzzell (Levin L. Brown, of counsel), for appellant.

Amos H. Stephens (LeRoy G. Edwards and Robert B. Cumming, of counsel), for respondents.

BIJUR, J. This action is based on negligence. Plaintiff testified, in substance, that while passing along the sidewalk in front of defendants' premises, she "step-

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ped on something" and then fell into the coal-hole, and that when she looked the cover was about two feet away.

I think that the testimony, while not very clear, was sufficient to indicate that the cover was on the hole when plaintiff stepped on it and that it sprang or was shoved off as a result of her stepping thereon. At all events, were the question important whether the cover was actually on the hole or two feet away when the plaintiff fell into the hole, it should have been submitted to the jury for determination. I do not think, however, that the difference is of any legal significance. It seems to me that the doctrine of *res ipsa loquitur* applies. The cover of the coal-hole is an instrumentality entirely within the control of the defendants both as to its construction and maintenance. If properly constructed and maintained it should be safe. Under these circumstances, on familiar principles, if the cover is not securely fastened or is actually off, these circumstances alone are sufficient to impute negligence to the defendants to the extent at least of calling upon them in the first instance for an explanation. That indeed was actually held in *Kuechenmeister* v. *Brown,* 1 App. Div. 56. There plaintiff testified that she stepped upon the cover of a coal-hole, "it flew away, and she fell down into the hole as far as her knees; * * * that the cover was lying by the hole and the hole was all open."

Although respondents seek to distinguish that case on the point that in the statement of facts it is said that the action "was sought to be maintained upon two grounds, the maintenance of a nuisance and negligence"—it is evident beyond a doubt from the opinion of Williams, J., that nothing was considered but the question of negligence. The court said: "It is evident that no accident would have occurred in the

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absence of negligence in keeping the cover properly secured. No one would have fallen into the hole so long as the cover was kept in its place by the appliances provided for that purpose. The case may, therefore, be treated purely as one of negligence, and in this view the question of defendant's negligence was clearly for the jury. If the cover was unsecured and out of its place and the plaintiff fell into the hole, as she testified she did, then certainly the defendant may be charged with negligence." See, also, *Scott* v. *Curtis*, 195 N. Y. 424. Even assuming that in the case at bar the evidence was insufficient to entitle the jury to find that the cover was on the hole when the plaintiff stepped on it, I am unable to distinguish between the *prima facie* inference of negligence that may be drawn in a case where the cover is on and one where it is off. In both it is equally evident that if the cover and the appliances to secure it were in order and properly secured the accident could not have happened. Moreover, the case is clearly to be distinguished from those in which the character of the accident and the circumstances attending it point as much to its being the result of interference by an outside force or of a third person as of the negligence of the defendant. See, for example, *Babbage* v. *Powers*, 130 N. Y. 281, in which the accident occurred because of a broken flagstone. Of this it is said in the statement of the case, at page 283: "It did not appear when or how it was broken, nor whether it was defective in any respect, nor was the cause of the accident shown, except as thus stated." It should be further noted that in the *Babbage* case the chief ground of contention was that the defendant was a "trespasser" on a public street by maintaining an authorized vault.

Respondents rely largely upon *Brady* v. *Shepard*, 42 App. Div. 24, and *Ornstein* v. *Unterman*, 159 N. Y.

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Supp. 636, decided in this court. We discussed the latter case solely from the standpoint of nuisance upon which the action was predicated. Moreover in that and the *Brady* case a full trial was had, plaintiff undertaking to prove the negligence of the defendant without any appeal to the doctrine of *res ipsa loquitur*. That subject was never suggested and never received any consideration. Indeed, it is clear that there is no room for the discussion or application of the doctrine of presumed negligence in a case where all the facts have been voluntarily disclosed by both sides.

Another case cited by respondents is *Maldosky* v. *Germania Bank,* 127 N. Y. Supp. 292, in which it was shown that the cover of the coal-hole had been broken by a third person a few minutes before the accident, and the court held accordingly that the intervening time was insufficient to afford the defendant an opportunity to learn of it or to impose upon him the obligation to repair it. The case has no relation to the issues in the present case which involves not the question of what evidence may be sufficient when offered on the part of the defendant to discharge him from his *prima facie* obligation, but what evidence on behalf of the plaintiff may be sufficient to raise the implication of negligence in the first instance.

A somewhat similar case cited by respondents (*Martin* v. *Pettit,* 117 N. Y. 118) is similarly without application.

The judgment should, in my opinion, be reversed and a new trial granted, with costs to appellant to abide the event.

PHILBIN and ORDWAY, JJ., concur.

Judgment reversed and new trial granted, with costs to appellant to abide event.

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DUNCAN G. HARRIS and C. WHEATON VAUGHAN, Co-partners, etc., Respondents, *v.* MORTON & COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, October, 1917.)

Brokers — action to recover commissions — agency — evidence — trial — lease.

In an action to recover brokers' commissions in procuring a subtenant for the lessee of certain premises it appeared that there were several brokers working on said lease, the exclusive agency of plaintiffs was not proved nor was there sufficient evidence on the point to justify the court in leaving the question to the jury, and the testimony as to whether plaintiffs or another was the efficient procuring cause of the lease was conflicting. *Held,* that a charge to the jury that where a broker is employed to find a lessee under an agreement for the exclusion of all other agencies the broker is entitled to his commissions when he produces a party ready to make the lease upon satisfactory terms to the owner or lessor, and the principal cannot relieve himself from liability by a capricious refusal to consummate the lease or by a voluntary act of his own disabling him from performance, and a further charge that if the owner employs a broker, with the understanding that the latter's agency shall be exclusive, the owner will subject himself to liability for breach of contract if, notwithstanding, he engages or avails himself of the aid of another broker for the same purpose, were clearly prejudicial to defendant calling for the reversal of a judgment in favor of plaintiffs.

That the jury must necessarily have understood that they might find that the plaintiffs had an exclusive agency for the lease of the premises and if so they were entitled to commissions, even though the lease was procured by the efforts of another broker.

APPEAL by defendant from a judgment in favor of the plaintiffs entered in the City Court of the city of New York upon the verdict of a jury.

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Townley, Foster & Chambers (Alfred H. Townley, of counsel), for appellant.

Carter, Ledyard & Milburn (Edwin De T. Bechtel, of counsel), for respondents.

ORDWAY, J. This action was brought to recover commissions claimed to have been earned by the plaintiffs as brokers in procuring a subtenant for defendant, which was the lessee of the premises. There were several brokers working on the lease and the real question involved was as to who was the efficient procuring cause of the lease. In my opinion the court erred in its charge to the jury on the point of exclusive agency claimed by the plaintiffs. It is not claimed that there was any specific contract, written or oral, between the plaintiffs and the defendant giving the plaintiffs the exclusive agency, unless it is found in the defendant's letter of May 12, 1913. This was a letter written by the defendant to the Riker-Hegeman Company at the request of the plaintiffs and delivered to the plaintiff Harris, in which the defendant, after stating that it understands that the premises had been offered to the Riker-Hegeman Company by other brokers at less than the terms authorized, viz., $17,000 per annum, goes on to say: "With the exception of Mr. Duncan Harris, to whom I made a special concession of $1,000 a year for the first two years only, and because he represented your corporation who in my judgment would make a good tenant, no other broker has been authorized to offer these premises at less than $17,000 a year." The record shows that the other broker, Clucas, was subsequently authorized to make the same offer, and thereafter the lease was made on those terms.

It is on the strength of this letter that the plaintiffs

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claim that they had an exclusive agency to make the lease, and they claim that since the lease was made on those terms to the Riker-Hegeman Company, with whom they were negotiating, they are entitled to the commissions.

There was conflicting evidence as to whether plaintiffs or Clucas was the efficient procuring cause of the lease. Of course, without reference to this letter or the question of an exclusive agency, if the plaintiffs were the efficient procuring cause of the lease, they would be entitled to recover the commissions, and the court left that question to the jury, but unfortunately the court also charged the jury as follows: "Where a broker is employed to find a lessee under an agreement for the exclusion of all other agencies, the broker is entitled to his commissions when he produces a party ready to make the lease upon satisfactory terms to the owner or lessor, and the principal cannot relieve himself from liability by a capricious refusal to consummate the lease or by a voluntary act of his own disabling him from performance. The law further provides: 'If the owner employs a broker, with the understanding that the latter's agency shall be exclusive, the owner will subject himself to liability for breach of contract if, notwithstanding, he engages or avails himself of the aid of another broker, for the same purpose.'"

To both parts of this charge the defendant separately excepted. These two paragraphs of the charge are quotations from the cases of *Moses* v. *Bierling*, 31 N. Y. 462, 464, and *Levy* v. *Rothe*, 17 Misc. Rep. 402, 403. The difficulty is that they were not applicable to the facts of this case, and must have been misleading. I think the jury must necessarily have understood from that charge that they might find that the plaintiffs had an exclusive agency for the lease of

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these premises and that if so plaintiffs were entitled to commissions even though the lease was procured by the efforts of another broker.

The plaintiffs did not claim that they had conversation with the defendant or its officers in which the defendant gave them an exclusive agency, and there is no evidence of any exclusive agency except so far as it is contained in the defendant's letter of May 12, 1913. But that letter is a mere statement that up to that date no other broker had been authorized to offer the property at the rental mentioned. It does imply that other brokers had been authorized to offer the property at $17,000 a year, and it does not state that thereafter the plaintiffs would be the only brokers who might offer the property at the reduced rental for the first two years. No purpose or intention is expressed as to the future, and the defendant does not limit in any manner its freedom of action in the future in that regard.

The case of *Levy* v. *Rothe, supra,* was a case where there was an express written agreement giving the broker "the option and sole agency for the period of six months," and the owner agreed "not to place the said premises for sale during said period in the hands of any other agent or broker," and the court relied on these very definite and express words to protect the plaintiff in his right to commissions.

In my opinion, there was no exclusive agency proved in this case nor was there sufficient evidence of such an exclusive agency to justify the court in leaving the question to the jury, or charging them that in the case of an exclusive agency the plaintiffs were entitled to recover commissions even if the lease were procured through the efforts of another broker. The respondents seem to claim that, even if this were not strictly an exclusive agency, they, nevertheless, were entitled

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to a reasonable time in which to perform to the exclusion of other brokers, but it seems to me that this claim is founded on the same assumption of an exclusive agency. Moreover, it seems to be well settled that since the authority of the plaintiffs was not coupled with an interest, and was not based on any consideration other than their efforts as brokers to earn their commission, the defendant could revoke it at any time, if it acted in good faith before the lease was actually made, without incurring any liability to the plantiffs. *O'Hara* v. *Murray*, 144 App. Div. 113; *Schultz* v. *Griffin*, 5 Misc. Rep. 499.

It seems to me that this charge was clearly prejudicial to the defendant, as the real question in the case was whether the plaintiffs or Clucas was the efficient procuring cause of the lease, whereas under this charge as to exclusive agency the jury would undoubtedly understand that they might find a verdict for the plaintiffs regardless of whether or not they were the efficient procuring cause of the lease.

BIJUR and PHILBIN, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

WILLIAM LEVIN, Respondent, *v.* NEW ENGLAND CASUALTY COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, October, 1917.)

Insurance (indemnity) — provisions of policy of — negligence — damages — automobiles — actions.

Where by the terms of a policy, by which defendant agreed to indemnify plaintiff up to a certain fixed amount against accidents occurring in relation to the operation of his automobile,

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and in the event of a suit against him to defend the same, defendant is under no duty to settle a claim, and where during the life of the policy the plaintiff, in an action for damages brought by one injured through the operation of his automobile, settles the claim in an amount a part of which defendant refused to pay, it is not liable to plaintiff for the amount which he contributed to the settlement of the claim in excess of that paid by defendant.

Ordway, J., dissents.

APPEAL by defendant from a judgment of the City Court of the city of New York entered upon a verdict directed by the court.

Menkel & Hinckley (Anthony M. Menkel and Edmund L. Cocks, Jr., of counsel), for appellant.

Morris & Samuel Meyers (Samuel Meyers and Morse Sable Hirsch, of counsel), for respondent.

PHILBIN, J. The plaintiff sued to recover the sum of $750, which he contributed to the settlement of a claim against him and which he asserts should have been wholly paid by defendant under its policy. The defendant offered no proof on the trial and the court directed a verdict in favor of the plaintiff.

The plaintiff was insured by the defendant against accidents occurring in relation to the operation of plaintiff's automobile. During the life of the policy, a person was injured through the operation of the automobile and later brought suit against this plaintiff for $10,000, which was subsequently increased to $25,000. The defendant's liability to this plaintiff was limited to $5,000 under the terms of the policy. The defendant began negotiations for the settlement of said suit, which dragged along till the eve of trial, when the plaintiff, being informed of the negotiations, consulted his own attorneys at the suggestion of the

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attorneys for the defendant. The claimant finally agreed to accept $3,150 in full settlement of his claim. The defendant refused to pay more than $2,400 and took the position that if plaintiff wanted to so dispose of the case against him he would have to pay the balance necessary to make up the $3,150.

The plaintiff paid such balance and now demands reimbursement from the defendant on the ground that the latter had agreed under its policy to pay any loss that plaintiff might sustain not exceeding $5,000. He also claims, in substance, that he was coerced into paying the $750 because of defendant's refusal and the belief that if the accident case went to trial a recovery would be had for a substantial sum exceeding the amount for which the defendant agreed to indemnify him. There is no question that the defendant was prepared to defend the suit and to fulfill the obligations of its policy, except in so far as plaintiff claims its refusal to pay a larger sum in settlement was a violation of its duty. The defendant was under no duty to settle the claim. The policy gave it the option of contesting it, if it saw fit to do so. It had the right to await the decision of the court as to the claimant's demand, or to pay such sum in settlement as it saw fit. The plaintiff apparently believed that it was to his interest to settle rather than face the uncertainty of a trial and a possible verdict against him, part of which he might have to pay. I think the defendant was acting strictly within its rights and in observance of the contract of insurance and that the plaintiff failed to make out a case of coercion or violation of the policy. Judgment reversed, with costs, and complaint dismissed, with costs.

BIJUR, J. (concurring). I concur with the views expressed by Mr. Justice Philbin. I cannot find in

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the policy of insurance any obligation, express or implied, on the part of the defendant to settle outside of court a claim made against the plaintiff nor to pay any particular proportion of such a settlement. Indeed, in the last analysis it is rather difficult to understand how such an obligation could be imposed without a very definite and detailed understanding in advance. The obligation of the defendant is, in substance, to indemnify the plaintiff up to a certain fixed amount and, in the event of suit brought, to defend that suit. If one or the other party to the contract deems it advisable to settle the claim either before or during the course of litigation, that is a matter for further convention between them. Moreover, we must not lose sight of the fact that a mere willingness, or even desire, to settle, can not be concretely considered apart from the question of the amount to be paid by the respective parties. There are few litigations which would not be settled were it not for the question of amounts. It follows, therefore, that in the instant case the assumption that defendant acted in bad faith is based rather on the conviction that its conduct was not nice or was impolitic rather than upon any breach on its part of an obligation, express or implied, undertaken by it toward the plaintiff.

While it is true that in *Brassil* v. *Maryland Co.*, 210 N. Y. 235, reference is made to "the obligation of good faith in carrying out what is written," it is plain that the decision is based upon the motion that the defendant violated a term which, under the circumstances, the court thought should be implied in the agreement. Indeed, in referring to the *Brassil* case in a subsequent decision (*Mason-Henry Press* v. *Ætna Life Ins. Co.*, 211 N. Y. 489, 498), Hiscock, J., says: "The case is entirely unlike *Brassil* v. *Maryland Casualty Co.*, 210 N. Y. 235. There the insuring com-

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pany pursued a course which we regarded *as in violation of its contract* and as most unfair toward the insured." The peculiar character of the circumstances in the *Brassil* case is exemplified by the description of them by Mr. Justice Werner in the opinion at page 241, where he says: "Having thus effectually tied the plaintiff hand and foot, the defendant left him to continue the fight as best he could." In the instant case no such situation, nor anything similar, is disclosed. Plaintiff's complaint, translated into plain business terms, amounts to this: that the defendant, in estimating all the chances of the litigation, concluded that it would be a fair settlement of the claim to give the claimant $3,150, provided it should be called upon to pay only $2,400 of this amount, and the plaintiff the remaining $750 in adjustment of their respective potential liabilities. I know of no reason why the defendant was not perfectly free to take this view in the absence of either statutory or contractual inhibition.

While the plaintiff claims that he was under duress, it is evident that he was under none. The defendant neither threatened nor suggested that it would withdraw in anywise from its contractual obligation to defend the suit to the utmost of its ability and in the utmost good faith. Having made a bargain in perfect freedom plaintiff seeks to withdraw from it and place the entire burden on the defendant, although from the very nature of the case, from the amount of the entire claim as put forward and from the terms of the contract between plaintiff and defendant it was potentially liable for only a part.

Neither *Brunswick Realty Co.* v. *Frankfort Ins. Co.*, 99 Misc. Rep. 639, nor *Wisconsin Zinc Co.* v. *Fidelity & Deposit Co.*, 162 Wis. 39, seems to me to have any material application to the instant case. In the first

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place, both of these cases arose purely on a question of pleading, and as is said in the Wisconsin case at page 53: "'pleadings are now construed on demurrer with exceeding liberality.'" In both cases the sufficiency of the complaint was challenged on demurrer. In both, therefore, plaintiff was accorded the maximum weight which his allegations might bear. In both cases the plaintiff appeared as the one desirous of settling the case, and, since by the terms of the contract he was forbidden to make such settlement without the consent of the defendant, some form of reasonable co-operation on the part of the defendant toward a settlement might be implied, at least sufficient to warrant the requirement that the company should in that respect act in good faith.

In view of these considerations and the vigor of the allegations in the complaint in both cases, we can understand how the demurrers thereto might be overruled without establishing any such principle as that appealed to by the plaintiff in the instant case. Referring to these allegations, the court, in the Wisconsin case, at page 54, said: "While the defendant has the right to consult what it deemed to be its own interest in making a settlement, it could not abuse the power vested in it and *recklessly and contumaciously refuse to settle if it was apparent that in all reasonable probability its conduct must not only result in damage to the plaintiff, but also in loss to itself.* Neither could it exercise the right conferred *for the purpose of perpetrating a fraud on the plaintiff.*" Although the Supreme Court of Wisconsin sustained the cause of action referred to, the discussion of the two other causes of action in the same complaint, substantially for the same relief, indicates its grave doubt whether any cause of action could in fact be proved. In the instant case, the proofs have been

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submitted, and to my mind they fall entirely short of establishing any cause of action. The judgment should, therefore, be reversed and the complaint dismissed, with costs.

ORDWAY, J. (dissenting). I dissent. The defendant insists upon the strict letter of the contract in order to defeat its spirit and intent. Its conduct placed the plaintiff in a position where he was virtually compelled to pay part of the loss which he was insured against, and which he had the right to expect that the defendant would bear. This was neither fair nor just, nor in accordance with the intent of the parties. As was said by the Court of Appeals in a somewhat similar case (*Brassil* v. *Maryland Casualty Co.*, 210 N. Y. 235, 240–241), where the defendant also relied upon the strict letter of the contract: "The mere statement of this unique situation indicates that the true measure of the rights of the plaintiff on the one hand and of the obligations of the defendant on the other is not to be found in the letter of the contract of insurance. That contract, by its very terms, was designed to exclude any such liability. But there is a contractual obligation of universal force which underlies all written agreements. It is the obligation of good faith in carrying out what is written. The defendant's failure to observe this requirement of the contract in suit is the thing upon which its liability may safely be predicated."

In that case the court went on to say, at pages 241, 242: "In the light of these conditions, it is idle to look to the letter of the insurance contract for the measure of the defendant's liability, and the fact that there are no precedents for such an action as this, is a very impressive indication of the unusual and inequitable attitude of the defendant. Without attempting to fur-

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ther characterize the defendant's position, it is enough to say that it would be a reproach to the law if there were no remedy for so obvious a wrong as was inflicted upon this plaintiff. His rights, as we have said, go deeper than the mere surface of the contract written for him by the defendant. Its stipulations imposed obligations based upon those principles of fair dealing which enter into every contract."

Undoubtedly the defendant had the right either to defend the suit against this plaintiff or to settle it at its option, but since it had by its contract deprived the plaintiff of any right to himself either defend the suit or settle it, or to interfere with the matter in any way, it was bound to use the utmost good faith towards him in handling the matter. Instead of doing so, it practically used its legal rights and powers as a club to compel the plaintiff to pay a portion of the loss against which it had indemnified him. By not denying the testimony of the plaintiff and his witnesses, it concedes that it represented to him that he was practically certain to lose the case against him, and that it was practically sure that there would be a very large verdict against him, much in excess of five thousand dollars, of which he would personally have to bear the excess over that amount, which was the limit of the policy of insurance, and that the proposed settlement for $3,150 was a reasonable and wise settlement, and a settlement which ought to be made; at the same time it informed him that no matter for what amount a settlement could be made it would refuse to make it or agree to it unless the plaintiff would contribute one-third of the amount of the settlement, and threatened to try the case although the result would almost certainly be a loss both to it and to the plaintiff unless he would contribute to the settlement; in other words, it threatened to subject both plaintiff and itself to almost cer-

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tain additional loss unless plaintiff would pay part of the amount of the settlement. The plaintiff desired and requested that the settlement should be made and naturally claimed that the defendant should pay the full amount thereof, it being less than the limit of the insurance, but on the defendant's refusing to make the settlement, unless he would contribute the sum of $750, he paid that amount to the defendant under protest and the settlement was made. In my opinion, this was a clear misuse of the defendant's powers under the contract of insurance; it showed a lack of good faith on defendant's part, and amounted to coercion and a fraud upon the plaintiff which entitles him to recover the amount so paid by him.

The conclusion which I have reached is sustained by the case of *Brunswick Realty Co.* v. *Frankfort Insurance Co.*, 99 Misc. Rep. 639, and *Wisconsin Zinc Co.* v. *Fidelity & Deposit Co.*, 162 Wis. 39. In the latter case, the court said, page 54: "While the defendant has the right to consult what it deemed to be its own interest in making a settlement, it could not abuse the power vested in it and recklessly and contumaciously refuse to settle if it was apparent that in all reasonable probability its conduct must not only result in damage to the plaintiff, but also in loss to itself."

Judgment reversed, with costs.

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CAMILLO CURRO, an Infant, by ANGELO CURRO, His Guardian ad Litem, Respondent, *v.* WILLIAM M. BARRETT, as President of ADAMS EXPRESS COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, October, 1917.)

Motions and orders — actions — calendar — trial — witnesses — when motion to dismiss action granted.

Six months after a judgment in favor of defendant in an action to recover for personal injuries alleged to have been caused by the negligence of defendant's chauffeur while operating his automobile had been reversed and a new trial ordered, plaintiff obtained an order to put the case on the calendar for trial on a day certain, but failed to file the order, and two months thereafter he obtained another order placing the case on the calendar for a day certain several months ahead and for failure of his counsel to appear on that day the case was sent to the foot of the general calendar. No attempt was made to have the case restored and it finally appeared on the call calendar six months later. *Held,* that defendant having clearly shown upon a motion to dismiss the action for lack of prosecution that in consequence of the delay it would be unable on the trial to produce eye-witnesses who were necessary and material and the only witness he could produce was his chauffeur and plaintiff fails to give any substantial or adequate reason for the delay, an order denying the motion will be reversed and the motion granted.

APPEAL by defendant from a judgment of the City Court of the city of New York, entered upon a verdict, and from an order denying defendant's motion for a new trial. The notice of appeal also brings up for review two intermediate orders of said court.

Everett, Clark & Benedict (Herman S. Hertwig, of counsel), for appellant.

Alexander Karlin, for respondent.

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PHILBIN, J. The plaintiff sued to recover $2,000 as damages for an injury alleged to have been caused by the negligence of a servant of the defendant while operating its automobile.

The answer was a general denial.

The appellant included in his appeal two orders, one denying a motion to dismiss the action for lack of prosecution and the other denying a motion for leave to renew said application. The facts alleged, upon which the application was made, relate to what transpired after a former trial at which the defendant was successful. After serving notice of appeal, the plaintiff did nothing until nearly seven months thereafter and then only when defendant moved to dismiss the appeal. In December, 1915, the judgment was reversed and a new trial directed. The plaintiff took no steps to bring on the new trial until the following June, when an order to place the case on the calendar for June 12, 1916, was obtained, but he failed to file the order. In August plaintiff obtained an order placing the case on the calendar for October 10, 1916. On that day, owing to the failure of plaintiff's counsel to appear, the case was sent to the foot of the general calendar. No attempt was made to have the case restored and it finally appeared on the call calendar in April, 1917. A motion to dismiss then made by defendant was denied, although defendant stated to the court that four out of his seven witnesses had disappeared during the two years' interval. The defendant then tried to find his witnesses, but was only able to find one, the operator of the automobile. He then made another application to the court for dismissal, and the other order appealed from, which denied the motion, was made. The defendant clearly showed on the motions to dismiss that, in consequence of the delay, he would be unable on the trial to produce witnesses who were

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necessary and material, and were, in fact, eyewitnesses. The only witness defendant could produce was the chauffeur, the value of whose testimony would obviously be affected by his own interest in the case. The moving affidavit also showed that junior issues had been tried. The plaintiff failed to give any substantial or adequate reasons for the delay. While the court is always reluctant to grant such a drastic remedy, there may be conditions which, in the administration of simple justice, demand it. I think this is such an instance and that the reversal of the order denying the motion to dismiss is required. *Brown* v. *Herzberg,* 130 App. Div. 894; *MacDonnell* v. *Press Pub. Co.,* 160 id. 872; *Toher* v. *Lochinvar Realty Co.,* 124 id. 370.

In view of the conclusion thus reached and the action of this court which is thereby called for, it is not necessary to discuss the appeal taken from the judgment and from the order denying defendant's motion to set aside the verdict and for a new trial. It may be said, however, that we think there was error in the charge of the learned court in relation to the defendant's omission to produce certain witnesses on the trial, which would call for a reversal of the judgment.

Order denying motion to dismiss the action for lack of prosecution reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. The judgment heretofore entered herein is vacated.

BIJUR and ORDWAY, JJ., concur.

Order reversed, with costs, and judgment vacated.

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Matter of the Application of JOHN J. GARDINER, as Deputy State Superintendent of Elections, to Direct CHARLES L. FLEET et al., as Inspectors of Election in the First Election District of the Eighth Ward of the City of Rensselaer, to Remove from the Registry List of Qualified Voters in said District the Names of DAMIEN WYDRO et al.

(Supreme Court, Albany Special Term, October, 1917.)

Election Law — provisions of, as to registration of students at seminaries maintained by Franciscan order — when name stricken from registry list.

A student at the seminary of learning known as "St. Anthony's-on-the-Hudson," maintained by the Franciscan order, who abandons his Christian name by which he was formerly known and takes a new name as a member of said order and receives instruction as a candidate for the Roman Catholic priesthood, is not entitled to register in the election district in which the seminary is located and his name should be stricken from the registry list.

PROCEEDINGS upon the application of John J. Gardiner, deputy state superintendent of elections, to direct inspectors of election to remove from registry list of qualified voters certain names.

Merton E. Lewis, Attorney-General (Arthur E. Rose, Deputy Attorney-General, of counsel), for petitioner.

Daniel H. Prior, for respondents.

RUDD, J. Under an order heretofore granted the inspectors of election in the first election district of the eighth ward of the city of Rensselaer were directed to

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show cause why the names of Damien Wydro and twenty-eight others should not be stricken from the registry list which is to be used at the general election in this state to be held November 6, 1917.

The application is made upon the petition of John J. Gardiner, as deputy state superintendent of elections.

The petition alleges that the names of Damien Wydro and the others are those of persons who are now registered as students at a seminary of learning known as St. Anthony's-on-the-Hudson, located in the election district in question. That because each of the persons thus registered is a student at St. Anthony's-on-the-Hudson therefore they are not, and each one of them is not, a resident of the election district, and that therefore their names are improperly upon the register, and that they are registered in violation of section 163 of the Election Law and of section 3, article 2 of the Constitution.

Section 163 of the Election Law provides as follows: "For the purpose of registering and voting, no person shall be deemed to have gained or lost a residence * * * while a student of any seminary of learning."

Excepting the words "registering and" in the first line this section is a verbatim quotation of section 3, of article 2 of the Constitution.

The question therefore, for determination here, is whether the registrants, by reason of their membership as a part of the student body of the seminary of learning known as St. Anthony's-on-the-Hudson, have lost their residences in the places from which they came and have gained residences at the seminary by reason of which they are legally entitled to register and vote in the election district in which the seminary is located.

Upon the hearing it developed that St. Anthony's-on-the-Hudson is, in the words of the statute, a "semi-

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nary of learning;" that each one of the registrants in registering gave his occupation as "a religious student;" that the house in which they live is maintained by the Order of Minor Conventuals, which is an order commonly known as the Franciscan; that these students are being instructed for the Roman Catholic priesthood; that they are members of the order, which order owns and maintains the home in the first election district in the eighth ward of the city of Rensselaer, known as St. Anthony's-on-the-Hudson, in which all of these candidates for the priesthood live; that any male of the age of sixteen years or over professing the Roman Catholic faith and with mental, physical and moral qualifications satisfactory to the superior of the order may be admitted to membership; that upon his admission to membership he makes a vow in public, at a ceremony held in a church in the presence of a congregation of people.

The vow is as follows:

"I Frater N. N. * * * do hereby vow and promise to Almighty God, to Blessed Mary ever Virgin, to our Blessed Father St. Francis and to you, Father, that I will, during my whole life observe the Rule of the Friar Minors, as ratified by Pope Honorius, as declared by other Supreme Pontiffs, and according to the privileges granted by the Holy Apostolic See to the Order of Minor Conventuals; by leading a strictly community life, observing the form of the Holy Canons and of the Council of Trent, of the Apostolic Constitutions particularly those of Pope Urban, and of the statutes of the aforesaid Order, living in obedience, without proprietorship, and in chastity."

That all of the respondents here have been admitted to membership in the order, having taken this oath in the manner above stated; that the statutes of the order provide that a member of the order shall live in

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obedience to his superior and that he shall always make his home with the order.

The superior in charge of St. Anthony's is Father Gregory Scheuermann.

The statutes provide that each member of the order is not permitted to retain, as his home or place of abode or residence, any other place except the place where he may live as a member of the order. He is not permitted to receive or retain any money or property as an individual but all of his possessions, by his becoming a member of the order, he gives to the order. In the event of illness he does not return to his former home, but the order assumes toward him the obligation of caring for him, should he become ill or infirm. At his death the order provides for his burial and his burial place is in the cemetery of the order.

Some members of the order are known as lay members. They perform manual labor in and about the house and the property of the order. No question is made as to the right of the lay members of the order to register from this institution. Others of the members are trained and educated by the order, in the house of the order, for the Roman Catholic priesthood. Some of the order are already Roman Catholic priests. No question is involved as to the priests being residents qualified to register and vote in the district.

The respondents are all students being trained in the priesthood. They are being trained in the house of the order by members of the order and no one else is living there except members of the order.

If a member should become physically or mentally unfit for the priesthood he would still retain his membership in the order and would remain there as a member of the religious community. Such a member not being in the seminary as a student would clearly be entitled to register. He is not free to return to his

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former home, even for a visit, except by permission of the superior.

He abandons the Christian name, by which he was formerly known, and takes a new name as a member of the order. This, in accordance with the statutes and traditions of the order, is for the purpose of giving evidence that he has renounced all his former connections, including family ties, family home and all worldly connections and associations he may have had, and that from henceforth he is to be associated in no-wise with any family, home or residence except that provided for him as a member of the order.

The obligations incumbent upon the respondents as members of the order, their status in life, their place of residence as members of the order, they have all publicly proclaimed by taking the vow in uniting with the order.

Father Gregory, the superior of St. Anthony's-on-the-Hudson, testified that these respondents come not simply for the purpose of being educated for the Roman Catholic priesthood but that they come to be each a religeuse, a member of the Franciscan order. They come to St. Anthony's-on-the-Hudson only after a test has been made to ascertain their qualifications at some institution in Syracuse.

These respondents are now devoting their time to study and preparation for the priesthood, and after they have qualified they may be sent to a distant country or some other state as a Franciscan priest.

Their abode at St. Anthony's is only for such length of time until they may receive consent from their superior to go elsewhere.

It is not required that they pay anything for their tuition or their living. They render such incidental service and assistance to the institution as they may be able.

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The father superior testified that the vow taken by the members of the order is such that the young man does not expect to go home, nor does he even ask.

In construing the same provision of the state Constitution which declares that: "For the purpose of voting, no person shall be deemed to have gained or lost a residence * * * while kept at any almshouse, or other asylum, * * * at public expense," it has been held that the fact of the presence in the Soldiers' Home at Bath of an inmate does not constitute a test of his right to vote, and is not to be considered in determining that question, but that the requisite qualifications to enable him to vote in the district in which the Soldiers' Home is located must be found elsewhere than in the fact alone that he lives in the home.

The mere fact that an inmate of the Soldiers' Home declares his intention to change his residence from New York to Bath, where the home is located, and his assertion that he resided in Bath, can only be accepted as conclusions from the circumstances detailed.

The court has held that the inmate's only intention in going to Bath was to be an inmate of the home and that only as such inmate his residency was to be continued. "He was not there as a citizen changing his residence, but as an object of well bestowed and deserving charity." He was in the institution because he was then "kept" at "public expense." "He continues there with the intention of making his residence in the institution, so long, as he says, 'as I shall be permitted to remain an inmate.'" These reasons were not sufficient to work an exception under the Constitution.

"He could not gain a residence by being an inmate, which means nothing more than his presence in the Home; and excluding that there is nothing in the case

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to show that a residence in Bath had been acquired." *Silvey* v. *Lindsay*, 107 N. Y. 55.

As was said in *Matter of Rooney*, 172 App. Div. 274: "Residence does not depend in the slightest degree upon the elective franchise; * * * Every man has the right of suffrage under the conditions named in the Constitution and laws, and one of the conditions of the exercise of that right is that he must have been a resident of the election district where he offers his vote for a period of thirty days prior to the election. * * * It is his intent to change or not to change his residence which is controlling; not his intent in reference to his exercise of a purely political franchise."

In *Matter of Barry*, 164 N. Y. 18, the petitioners seeking registration entitling them to vote were ecclesiastical students in St. Joseph's Seminary, established for the purpose of educating young men for the Roman Catholic priesthood. No one was allowed to enter or remain in this seminary as a student unless he intended in good faith to become a Roman Catholic priest and renounce all other residences or homes save that of the seminary itself, and upon his admission to the priesthood he continues in the seminary until assigned elsewhere by his ecclesiastical superiors.

The court held: "The fact that a student enters a seminary to be educated for a certain calling, and to remain there after graduation until assigned to duty, instead of a fixed course of four years, as is usual in institutions of learning, does not entitle him to vote in the election district in which such seminary is situated."

In expressing the opinion of the court, Judge Bartlett said: "The fact that he is enrolled as a student in an institution of learning has no effect whatever upon his residence for the purpose of voting; *he could if he chose acquire a residence at the place where the semi-*

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nary is located, but this would have to be established by acts entirely distinct from his residence therein. The mere intention to change his residence would not suffice."

Judge Bartlett further says: "In the case at bar no acts which are distinct and independent of the presence of the petitioners in St. Joseph's Seminary are disclosed."

In the *Matter of Goodman,* 146 N. Y. 284, Judge Finch said: "Usually, perhaps always, the voting residence remains unchanged until a new residence is actually acquired, but there can be no such acquisition merely by an abode as a student in an institution of learning. Something else, beyond that fact and wholly independent of it, must occur to effect the change. The intention to change is not alone sufficient. It must exist, but must concur with and be manifested by resultant acts which are independent of the presence as a student in the new locality."

In *Matter of Garvey,* 147 N. Y. 117, it was held that Barry, who was a student in the General Theological Seminary of the Episcopal Church, in New York city, who had taken up his residence in a part of the property of the General Theological Seminary in the city of New York, having come to New York from the state of Virginia, was entitled to register and vote from his newly acquired residence in New York, because Barry had disclosed "the intent to change his legal residence by acts which were independent of his presence as a student in the seminary."

The acts referred to by the court consisted in addressing a letter to the registrar of Warrenton, Va., where Barry had formerly resided, in which he notified him that he had changed his residence to the city of New York, and also in the addressing of a letter to Bishop Potter in which he had said that it was his intention to reside and vote in New York.

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This the court held was a full compliance with the rule laid down in the *Goodman* case.

The compliance consisted in Barry establishing his residence in New York city before his admission as a student in the seminary, in other words, he first established his ecclesiastical status as a resident of the diocese of New York, thus qualifying himself for admission to the seminary, and he therefore became a resident of New York as evidenced by acts entirely separate and apart from attendance at the seminary.

In *Matter of McCormack,* 86 App. Div. 362, it was held that a student at a seminary of learning is not entitled to vote in the election district in which the seminary is situated, unless it appears that, by some unequivocal act, independent of his attendance at the seminary, he has abandoned such other residence; that letters written by the student to the mayor of the city in which the seminary is located, stating that it was his intention when he became a student at the seminary to make it his actual and legal residence, but which do not suggest any fact showing such a change of residence other than his abode at the seminary, are insufficient to effect a change of residence.

In the case Justice Woodward said: "The petitioner does not suggest a single fact to show a change of residence outside of his abode at the seminary, either in his letter to the mayor or in his petition.

"The declarations of the petitioner made in a letter to the mayor of Yonkers and to the board of registry of the district are of no more consequence than his verbal declarations to the board of registry, and as no facts bearing upon the change of residence were placed before the court, *which were independent of the temporary residence of the petitioner as a pupil in the seminary,* we are clearly of opinion that the order denying the motion was proper."

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We have quoted somewhat at length from the decisions in this state, illuminating the question here involved. From all of the cases it seems clearly that the rule is that where an intent to change an elector's residence is evidenced by acts which are independent of his presence in an institution of learning he may acquire a residence in the district where he attends as a student.

The respondents here contend that because they are members of an order and in acquiring such membership they have taken a vow at church in the presence of a congregation of people, renouncing all other homes, save that at the seminary; that because they have consecrated their lives, giving all of their mental, physical and spiritual effort to the order of which they are members, and that incidentally they have renounced their former christian names and assumed other names, under which they have registered as qualified voters, that by reason of these public acts, this public renunciation and public assumption of obligation, that therefore they have brought themselves within the rule which the courts of this state have laid down requiring the intent to change a residence to be evidenced by acts which are independent of their presence as students in an institution of learning.

We must be governed, however, by the determination already made involving the same situation. In *Matter of Barry,* 164 N. Y. 18, above cited, it was clearly held that one does not acquire a residence in a theological seminary because, under its rules, on entering he is required to renounce all other residences, and after he has completed his studies he must remain in the seminary until assigned elsewhere by his ecclesiastical superiors.

That is just the situation here, the young men

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renounce their former residences and their former names, they remain for all time in the order, possibly in this home, possibly somewhere else, according to the wishes and instructions of their superiors. They are there as students, they have registered as such; whether in complying with the rules as to renouncing their former residences they have taken an oath is not material, they have, as did Barry, complied with the regulations. If they continue as students until ordained as priests, during their residence at the seminary as such, their status is clearly fixed, and under the Constitution they cannot during such studentship acquire a residence which entitles them to registration in the district where they make their sojourn.

The respondents are not entitled under the law to register in the first election district of the eighth ward of the city of Rensselaer and their names should be stricken from the registry list to be used at the general election to be held on the 6th day of November, 1917. An order may be entered in accordance herewith.

Ordered accordingly.

VICTORIA PHALEN, as Administratrix, etc., of JOHN PHALEN, Deceased, Plaintiff, *v.* WALTER S. RAE and NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendants.

(Supreme Court, Rensselaer Trial Term, October, 1917.)

Negligence — contributory — actions — when defendant entitled to judgment.

In unloading lumber from a car on a siding, two men were engaged in raising the lumber and plaintiff's intestate was engaged in blocking it. For some unexplained reason a piece of lumber was allowed to project from the side of the car toward

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the main track and one of the defendant's freight trains, running from two to four miles an hour, ran against the projected timber, causing it to turn so as to engage the body of plaintiff's intestate and throw him to the ground so near to the main track that some part of the engine or tender struck him on the head and killed him. *Held,* that on proof that the engineer when fifteen feet away from the car on the siding blew the whistle, applied the brakes, except the emergency brakes, and gave deceased notice to pull in the plank, defendant was entitled to judgment.

ACTION for negligence.

J. F. & W. H. Murray, for plaintiff.

Visscher, Whalen & Austin, for defendant railroad.

HASBROUCK, J. On the 23d of January, 1914, John Phalen, the plaintiff's intestate, was at work unloading a car of lumber at South Little Falls. The car was on a siding and the lumber was held in it by stakes which projected above the sides. In type the car was what is known in railroad operation as a gondola car. In unloading the lumber two men were engaged in raising it up and Phalen in blocking it. For some reason, which does not appear in the evidence, a piece of this lumber was allowed to project from the side of the car on the switch toward the main track. A freight train running from one to two miles an hour ran against the projecting timber and caused it to turn so as to engage the body of Phalen and throw him on the ground so near the main track that some part of the engine or tender struck plaintiff's intestate on the head and killed him.

The complaint among other things charges that the defendant railroad "ran its engine carelessly, negligently and wantonly against the appliance with which plaintiff's intestate and others were working and

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caused same to be moved so that it struck plaintiff's intestate and threw him to the ground * * * so that he sustained injuries from which he died."

There was a trial had of the action upon the theory of negligence which resulted in a verdict in favor of the plaintiff for $10,000. The judgment was finally reversed in the Court of Appeals upon the ground that the plaintiff's intestate was guilty as matter of law of contributory negligence and a new trial ordered. Such trial was had before Mr. Justice Howard and a jury. The case was submitted to the jury to find whether the grievous act was wanton and the jury failed to agree. The case has been now stipulated to be tried before the court without a jury.

Upon second trial the evidence was not changed in any material respect. To ascertain whether the complaint be justified the conduct of the engineer who operated the locomotive should be examined. The train was made up of an engine and sixty loaded cars of coal. Some thousand feet away from the siding, Martin, the engineer, noticed a car there and a man working in it. The train was drifting and as it approached the siding had slowed down to between one and two miles an hour. When from twenty to thirty feet away from the car the engineer noticed that a timber protruded over the side of the car. He though it might collide with the engine and called out to plaintiff's intestate "You son of a bitch pull your board in." When about fifteen feet away he saw the plaintiff's intestate endeavoring to pull the board in. About the same time Martin called to Phalen he blew the engine whistle and applied a brake making a reduction of ten pounds the result of which was to stop the train in the ordinary way. It stopped about two cars length past the point of the accident. The plaintiff claims that the conduct of Martin was wanton in not

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applying the emergency brake. Is that fact alone sufficient to charge the defendant with wantonness? Martin swears "you couldn't stop that train no matter what you done with it" so as to keep it from colliding with the plank. It does not appear that Martin knew or that any prudent man could have foreseen that the collision with the projecting timber would have resulted in injury or death to Phalen. It does appear from the reprehensible language Martin used in accosting Phalen that Martin's idea was to save his engine from the collision and that he thought the danger lay there. He further gives as a reason for not using the emergency brake that with the train proceeding from one to two miles an hour such an application of the brakes would have been "to buckle the train and put it over if there is a weak spot at all."

The decision of the case hangs upon whether Martin's conduct in the premises was wanton. To constitute such conduct there must be a conscious knowledge in a person of existing conditions; that injury would be likely to result from the act and that then heedlessly and recklessly he performed some wrongful act or omitted some known duty which produced the injurious result. Bouvier Law Dict. 3418; *Hazle* v. *Southern Pac. Co.*, 173 Fed. Repr. 431; *Louisville & Nashville R. R. Co.* v. *Webb*, 97 Ala. 312; *Ga. Pac. Railway Co.* v. *Lee*, 92 id. 271; Words & Phrases, 7385.

It will be seen from the definition that wanton negligence and negligence are quite distinct from one another in the law. The plea of contributory negligence constitutes no defense to a complaint for a wanton act. It makes no difference what the degree of negligence charged may be, whether slight, ordinary or gross. *Milwaukee & St. Paul R. R. Co.* v. *Arms*, 91 U. S. 494.

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Indeed the highest authorities ignore degrees of negligence in administering the law. Such divisions of negligence are held to serve no useful purpose. One of the tests of whether an act constitutes wanton negligence is whether exemplary damages may be imposed. Sedg. Dam. (9th ed.) 729.

Would the facts in this case warrant the imposition of such damages? That depends upon whether the conduct of the engineer was purposely mischievous or malicious or whether it was so reckless and regardless of consequences as to be the equivalent of a willful act. An act to be wanton in the law should be without care. Where there exists slight care or some care it may not be held to be wanton. *Milwaukee & St. Paul R. R. Co.*, v. *Arms, supra.*

Applying such rule to the case at bar we are unable to hold the act of the defendant to be more than negligent. The engineer looked, blew his whistle, applied the brakes, except the emergency brakes, and gave notice to the deceased to pull in the plank. While such conduct undoubtedly was not adequate to the requirements of the situation and he should have applied the emergency brakes, yet in the light of the definition and the authorities we are compelled to hold that the conduct of the defendant was not wanton and that it should have judgment.

Judgment accordingly.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. HENRY REUTHER, Relator, *v.* HERBERT S. SISSON, State Commissioner of Excise, and FRANK P. CALLISTER, as Special Deputy Commissioner of Excise for Monroe County, Respondents.

(Supreme Court, Monroe Special Term, October, 1917.)

Statutes — power of legislature to reduce the number of liquor tax certificates — authority to local commission to determine what existing places shall be licensed — Liquor Tax Law.

The legislature, having power to reduce the number of liquor tax certificates in the state by limiting the number in proportion to the population, for the purpose of reducing the existing number may authorize a local commission to determine, after investigation and inquiry, which existing places shall be licensed and which shall not be, and may provide that their determination is final and conclusive.

HEARING on writ of certiorari to review a refusal to grant a liquor tax certificate.

The relator conducted a place for the sale of intoxicating liquors at the Lake Shore Hotel in the town of Irondequoit under a liquor tax certificate expiring October 1, 1917. On May 22, 1917, the legislature amended the Liquor Tax Law by chapter 623 of the Laws of 1917 so as to reduce the number of certificates issued in towns of the state to the ratio of one for each 500 inhabitants (§ 8, ¶ 9, subd. c), and in order to reduce the number of certificates to correspond with this ratio provided for the appointment of three commissioners by the town board subject to the approval of the State Commissioner of Excise (§ 8, ¶ 9, subd. c (2)) who were to investigate on or before August 10, 1917, as to the location of places within the town where trafficking in liquors was engaged in and inquire as to the conduct of such business at such places and upon the completion of the investigation

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and inquiry to determine as to the places within the town not exceeding the ratio of one for each 500 of the population thereof where trafficking in liquors should be continued for the year beginning October 1, 1917 (§ 8, ¶ 9, subd. c (3)), and prepare a written statement containing a description of the places where such trafficking in liquors should be continued and the places for which a liquor tax certificate should not be issued for the ensuing year. (Id.) It is declared by the statute that its purpose is to reduce on and after October 1, 1917, the number of places or premises in which the business of trafficking in liquors may be conducted to the ratio named and to prevent the issuance of any additional certificates until the ratio has been exceeded. § 8, ¶ 9, subd. c (7). The determination of the commission was made final and conclusive. § 8, ¶ 9, subd. c (4). There were thirty places for which liquor tax certificates had been issued in the town of Irondequoit when the statute went into effect and it reduced the number for which certificates could lawfully be issued for the year beginning October 1, 1917, to nine. The function of the commission therefore was to select nine places out of the thirty holding liquor tax certificates for the issuance of certificates for the year beginning October 1, 1917. The relator's place was not selected and he has brought this proceeding contending that the statute is unconstitutional in that it vests in the commission an arbitrary authority to select the places for which certificates should be issued and that his constitutional and statutory rights have been violated.

Henry W. Martens (John F. Kinney, of counsel), for relator.

Harry D. Sanders (Clarence Macgregor, of counsel), for respondents.

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RODENBECK, J. The statute attacked by the relator seeks to regulate the sale of intoxicating liquors. Among other provisions it reduces the number of places to which certificates may be issued in a town to a ratio not greater than one in 500 of population. This the legislature had the undoubted right to do since it possessed the power to prohibit such sale entirely. It is not this feature of the law that the relator complains of but the method adopted by the legislature in determining which of the places in his town holding certificates should be entitled to them after the expiration of the year for which they were issued. It will be observed that the statute does not terminate any existing certificate and is therefore not subject to attack on the ground that it has taken away any right or divested the relator of any property under his certificate. The claim is that the state can not authorize a commission in the manner provided to select nine out of the thirty places holding certificates in the town and refuse one to the relator. The claim of the relator must be based upon some right or privilege guaranteed to him by the laws or Constitution of the state or of the United States.

In determining whether any such right has been interfered with it is necessary to bear in mind that the business in which he was engaged is subject not only to regulation but to prohibition by the state authorities. *Bertholf* v. *O'Reilly,* 74 N. Y. 508, 520; *Metropolitan Board of Excise* v. *Barrie,* 34 id. 657; *Lloyd* v. *Dollison,* 194 U. S. 445, 449; *Rippey* v. *Texas,* 193 id. 504. In considering whether he has been deprived of the equal protection of the laws or of any property without due process of law it must be remembered that there is " no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United

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States." *Crowley* v. *Christensen,* 137 U. S. 86, 91; *Bartemeyer* v. *Iowa,* 18 Wall. 129; *Jacobs Pharmacy Co.* v. *City of Atlanta,* 89 Fed. Repr. 244. The right of the state to regulate and prohibit traffic in liquors goes to such an extent that it may prohibit the manufacture and sale of ardent spirits to be used as a beverage without compensation for the diminution in the value of property whose chief value consists in its fitness for such manufacturing purposes. *Mugler* v. *Kansas,* 123 U. S. 623.

There was no right or privilege to sell intoxicating liquors attaching to relator's place of business or to himself under the Constitution, laws or vote of the electors of the town which could not be revoked after the expiration of his certificate by a change in the statute under which his license was issued. *Matter of Hering,* 133 App. Div. 293. He was given ample opportunity to dispose of any stock of liquors he may have had on hand and the question of the appropriation of such property is not involved. *Wynehamer* v. *People,* 13 N. Y. 378. The police power cannot be contracted away. *Beer Co.* v. *Massachusetts,* 97 U. S. 25. It extends to any measures that the legislature may reasonably deem necessary to protect public health, public welfare and public safety. The extent of the regulation depends upon the occupation. Even lawful occupations may be regulated by the legislature. Where the occupation may be entirely prohibited the power of regulation is correspondingly enlarged. "All property is held subject to the power of the state to regulate, or control, its use, in order to secure the general safety, or the general welfare." *People* v. *New York Carbonic Acid Gas Co.,* 196 N. Y. 421, 436. "The impossibility of setting the bounds of the police power has up to this time prevented any court from attempting it." *People* v. *Lochner,* 177 N. Y. 145,

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152. The legislature may prescribe the regulations in statutory form and issue licenses through its own officers but it may also leave these regulations and the issuance of licenses to the discretion of local authorities. In this instance it has provided for the creation of a commission to be selected by the town board, residents of the town, who should be persons of good standing in the community and familiar with the conditions in the town. It directed that this commission should investigate and inquire as to the places where liquor was sold and it left it to this commission to determine which nine places in the town should be entitled to certificates under the provision in the statute reducing the number to correspond to one for every 500 of inhabitants. It vested in this commission not an arbitary authority but a discretion to select the places after investigation and inquiry. The legislature might have exercised this discretion itself or through its officers but there is no objection to vesting this discretion in a commission appointed as provided by the act. *Village of Saratoga Springs* v. *Saratoga Springs Gas, Electric Light & Power Co.*, 191 N. Y. 123; *Lieberman* v. *Van De Carr*, 199 U. S. 552; *Wilson* v. *Eureka City*, 173 id. 32; *Fischer* v. *St. Louis*, 194 id. 361; *Stanton* v. *Board of Supervisors*, 191 N. Y. 428. Numerous statutes might be cited which have been sustained by the courts where the authority to license has been vested in local officers in their discretion. It would be difficult to conduct the affairs of municipalities unless the legislature possessed this power of delegating administrative functions. The discretion vested in the commission is not open to question. The rejection may have been based upon the ground of the concentration of the certificates in one locality. The relator's place of business is at a summer resort where a large proportion of the places

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for the sale of liquor in the town of Irondequoit are located. The commission may have been prompted in eliminating relator's place by the desire to distribute more widely the places where liquor might be sold or the exercise of their discretion may have been based upon considerations of the suitability of the relator to conduct the business. The statute confided this determination to the commission after investigation and inquiry. It did not authorize them to act arbitrarily. There is no presumption that they did. The duty imposed upon them required them to eliminate at least twenty-one of the places where liquor was sold and it is to be presumed that they acted in compliance with the statute. *Lieberman* v. *Van De Carr, supra.*

"The constitutionality of administrative discretion in the matter of granting or refusing liquor licenses is generally conceded." Freund Police Power, § 652. "The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the State." *Crowley* v. *Christensen, supra.* In *Matter of Armstrong,* 65 App. Div. 123, a statute authorizing and empowering the police department to grant licenses for theatres without specification as to the qualifications of the licensees was sustained. In *People ex rel. Schwab* v. *Grant,* 126 N. Y. 473, a statute was upheld which authorized the mayor of New York to grant licenses to auctioneers without limitation as to qualifi-

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cations of applicants. In *People ex rel. Hoy* v. *Mills,* 91 Hun, 144, the refusal to grant a license to sell intoxicating liquors upon the ground that there was a sufficient number of places already licensed was sustained. In *Roderick* v. *Whitson,* 51 Hun, 620, an ordinance was upheld which required a permit of the president of a village for any person to beat a drum or tabourine or make any noise with an instrument upon a public street. A statute prohibiting the sale of intoxicating liquors in drug stores has been upheld. *Jacobs Pharmacy Co.* v. *City of Atlanta, supra.* In *Quincy* v. *Kennard,* 151 Mass. 563, it was admitted that the board of health had authority to prohibit the keeping of swine in the town of Quincy but it was contended that the legislature could not make the right dependent upon a permit of the board of health, with reference to which Mr. Justice Holmes said: "We are at a loss to see how it affects the validity of the order that the board expressly reserved to themselves a power to do what they could have done even if the prohibition had been absolute, or how the defendants are put in a worse position by the order contemplating the possibility that the board of health may grant them a written permit than if it had excluded that possibility." P. 563.

In *Davis* v. *Massachusetts,* 167 U. S. 43, an ordinance denying the right to make a public address upon any public street without a permit in the city of Boston was sustained with the remark, very pertinent in the case at bar: "The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser." P. 48.

In *Wilson* v. *Eureka City, supra,* an ordinance was sustained which vested in city officers the authority

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to say whether a permit should be granted to move a building through a public street against a contention similar to that made here that it committed the rights of the plaintiff to "unrestrained discretion."

In *Fischer* v. *St. Louis, supra,* an ordinance was sustained which gave the municipal assembly the power to grant permission to maintain a dairy and cow stable in the city of St. Louis, Mr. Justice Brown saying: "Defendant's main contention, however, is that, by vesting in the municipal assembly the power to permit the erection of dairy and cow stables to certain persons, a discrimination is thus declared in favor of such persons and against all other persons, and the equal protection of the laws denied to all the disfavored class. * * * We do not regard the fact that permission to keep cattle may be granted by the municipal assembly as impairing in any degree the validity of the ordinance, or as denying to the disfavored dairy keepers the equal protection of the laws. * * * Such distinctions are constantly made the basis for licensing one person to sell intoxicating liquors and denying it to others * * *. We have no criticism to make of the principle of granting a license to one and denying it to another, and are bound to assume that the discrimination is made in the interest of the public, and upon conditions applying to the health and comfort of the neighborhood. * * * The only alternative to the allowance of such exceptions would be to make the application of the ordinance universal."

In *Matter of Hoover,* 30 Fed. Rep. 51, the applicants for licenses to sell spirituous liquors were required to apply to the ordinary of the county or to the county commissioners of the county where such existed, who had the power "to grant or refuse such application." The contention was made that the statute violated the fourteenth amendment of the Constitution of the

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United States with reference to which the court said: "Now, if the state may prohibit the sale of liquor altogether, since it is clearly not a 'privilege or an immunity' in the meaning of the constitution, may it not authorize the sale on such terms, by such persons, and at such places, as it thinks proper? And, if it may do this directly, may it not delegate to others the exercise of the power? It has simply delegated a portion of its sovereignty to the county commissioners of Chatham county. The commissioners, in the exercise of that sovereignty, refuse a license to the petitioner. The discretion must rest somewhere. The state might have exercised it. It intrusts its discretion to the board of county commissioners, and, as I have said, by the terms of the grant, this discretion is final, and not reviewable. This power is inseparable from the sovereignty of the state." P. 55.

These and a long line of similar cases, which might be cited, are sufficient to show that the legislature having the power to prohibit the sale of intoxicating liquors entirely may determine through a local commission after investigation and inquiry who shall exercise and enjoy that right after the expiration of existing licenses particularly where in the exercise of its police powers it determines to reduce the number of licenses.

The legality of the plan for reducing the number of certificates in the town is substantially the same in principle as if the commissioners had been authorized to grant additional certificates after investigation and inquiry. It was not necessary for the legislature to prescribe that the licensees should be of "good moral character" or "suitable persons." Even if such qualifications had been inserted in the statute how would that help the relator if only nine licenses could be

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granted and he were denied one? Has he the right to insist that some one else of "good moral character" or some other "suitable person" should step aside in his favor? There are many more than nine "suitable persons" and many more than nine persons of "good moral character" in the town, no doubt, who would like to have a license. Could the decision between the applicants be made in a more fair and reasonable manner than that provided in the statute by a commission of his own townsmen?

It argues against the power of the legislature to reduce the number of licenses in the town to say that the relator, being a suitable person, is entitled to a license. If he is entitled to a certificate then every one of the twenty who were left out who are suitable persons is likewise entitled to a certificate. Where shall the line be drawn? If the statute had provided, as it legally might, that there should be but one license in the town, it would be absurd for the relator to say that he should be selected and that it was unfair to leave the selection to a commission as between him and his fellow townsmen in the same business. Admitting that the relator is eminently well qualified to carry on the business, it is a sufficient answer to him to say that there were nine other persons in the business equally well qualified whom the commission have selected in preference to him and perhaps without any objections to him or to his place of business.

If this is not a sound conclusion, then the relator is entitled to a certificate and all the remaining twenty who are suitable persons who have been denied a certificate are each entitled to one and the legislature by this course of reasoning is denied the right to reduce the number of certificates although it has the undoubted power to abolish the traffic in liquors entirely. The legislature has the power to reduce the number of

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liquor licenses in the state by limiting the number that shall exist in proportion to the population and for the purpose of reducing the existing number may authorize a local commission to determine after investigation and inquiry which places shall be licensed and what places shall not be licensed and to provide that their determination shall be final and conclusive. *Slaughter-House Cases*, 16 Wall. 36; *Matter of Hoover, supra; United States* v. *Roman*, 33 Fed. Repr. 117. Every presumption is in favor of the constitutionality of the statute. *People ex rel. Rochester* v. *Briggs*, 50 N. Y. 553, 558. The fourteenth amendment of the federal Constitution does not abrogate or impair the police powers of the states. *Barbier* v. *Connolly*, 113 U. S. 27. The constitutionality of the statute is open to the courts but the exercise of the discretion of the commission is not subject to review. The statute makes it final and conclusive and the purpose is to avoid substituting judicial judgment for administrative discretion. The test is the violation of the fundamental law. The motives of the legislature can not be inquired into. It is not sufficient that the statute may seem unfair. With the wisdom of the legislation the courts have nothing to do. If the statute does not violate the Constitution the remedy is in the legislature and not in the courts. The writ should be dismissed.

Writ dismissed.

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CROCKER-WHEELER COMPANY, Plaintiff, v. GENESEE RECREATION COMPANY, Defendant.

(Supreme Court, Monroe Special Term, October, 1917.)

Jurisdiction — Supreme Court — constitutional law — statutes — rules — actions.
Damages — measure of — judgments — replevin.

The Supreme Court where not restricted by constitutional or legislative enactments has power to declare, define and limit substantive rights in pending actions and proceedings of which it has jurisdiction and to prescribe rules of procedure for their protection and enforcement.

Where the defendant delays by appeal the satisfaction of a judgment in an action to recover personal property, the plaintiff is entitled to damages for the delay to be measured by the interest on the value of the property sought to be replevied as fixed on the trial whether the value is paid or the property restored.

MOTION for damages pending an appeal in an action for replevin.

Isaac Adler, for motion.

Wile, Oviatt & Gilman, opposed.

RODENBECK, J. The legislative power of the state is vested in the legislature subject to the veto power of the governor and may be exercised not only to declare, define and limit the substantive rights of persons subject to the jurisdiction of the state but to prescribe the procedure by which those rights may be enforced or protected. So far as those rights and the method for their enforcement are not prescribed by the legislature they may be declared, defined and enforced by the Supreme Court of the state in pending

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actions and proceedings of which it has jurisdiction subject to the limitations of the Constitution. The procedure in the Supreme Court is almost wholly regulated in this state by statutory enactments but nevertheless this court has exercised its right to prescribe rules of procedure by adopting rules of practice not inconsistent with statutory enactments on the subject. The substantive rights of persons are largely controlled by decisions of the courts supplemented by a large body of special and general statutes but the great body of the substantive law of the state still remains unreduced to statutory form. There seems to have been in this state an aversion to controlling the power of the Supreme Court with respect to the declaration of substantive rights but a desire on the other hand to control its action by minute procedural rules in the determination of those rights.

This case presents an illustration of the power and necessity of the application of the authority of the Supreme Court to prescribe substantive rights. The plaintiff has secured a judgment in an action to recover personal property. The property was not replevied and it obtained a judgment for the recovery of the property or the value which was fixed as of the time of the trial. There has been a delay in the satisfaction of the judgment due to appeals by the defendant and the judgment having become final, and the defendant now offering to return the property, the plaintiff asks for damages by way of interest on the value of the property as fixed on the trial in addition to the property. The subject is not regulated by statute and the court is not restricted by any rules of the common law. It therefore becomes necessary to determine whether or not in an action to recover personal property where the value of the property is fixed at the time of the trial the plaintiff if successful after

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delays due to appeals by the defendant is entitled to the property and interest on the value of the property as fixed on the trial as damages for the delay.

In the absence of statutory provisions controlling the action of the court or prior decisions which should be followed as precedents, the court must fall back upon the broad principles of equity in determining the controversy. The defendant is responsible for the delay in delivering the property through its appeal and should not be allowed to take advantage of its own acts. The judgment carries interest on the value as damages where the damages are caused by the defendant and it requires no statutory authority therefor. This allowance of interest follows as a matter of course as does the interest upon a judgment. *Brewster* v. *Silliman,* 38 N. Y. 423, 431; *Earle* v. *Gorham Mfg. Co.,* 2 App. Div. 460, 474; *McDonald* v. *MacDonald,* 71 Misc. Rep. 516. Where the defendant delays by appeal the satisfaction of a judgment to recover personal property the plaintiff is entitled to damages for the delay to be measured by the interest on the value of the property replevied as fixed on the trial whether that value is paid or the property restored. The action of replevin is an old common law action and the provisions of the Code of Civil Procedure are merely regulations of and restrictions upon the common law authority of the courts.. There are none reaching this question. Where the value of the use is not established legal interest is presumed to measure the use (*New York Guaranty & I. Co.* v. *Flynn,* 55 N. Y. 653; *Crossley* v. *Hojer,* 11 Misc. Rep. 57; *Redmond* v. *American Mfg. Co.,* 121 N. Y. 415) whether it be of a chattel or of money, and a judgment for the possession and return of a chattel not only covers the specific chattel but interest by way of damages for delay by the defendant in delivering the chattel just as

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a defendant pays interest on a money judgment for the use thereof during delay payment. Interest on a judgment was allowed at common law (*Bissell* v. *Hopkins*, 4 Cow. 53; *Van Valkenburgh* v. *Fuller*, 6 Paige, 10; *O'Brien* v. *Young*, 95 N. Y. 428, 433) and the provisions of the Code of Civil Procedure in this respect are declaratory of the common law. Code, §§ 1211, 1233; *Donnelly* v. *City of Brooklyn*, 121 N. Y. 9, 19. No new action will lie for these damages and the plaintiff must recover them in this action if at all. *Commerce Exch. Nat. Bank* v. *Blye*, 123 N. Y. 132. There is nothing in the statutes to militate against this just and reasonable rule and it should prevail in the interest of fair dealing and obvious principles of justice.

Ordered accordingly.

ELIZABETH M. MURPHY, as Executrix, etc., Plaintiff, *v.* EDWARD A. KEENAN, as Director and Trustee, etc., Defendant.

(Supreme Court, Monroe Special Term, November, 1917.)

Discovery — inspection — when application for disclosure of books, papers and documents granted — actions — pleading — evidence — Code Civ. Pro. § 803.

Under section 803 of the Code of Civil Procedure and rule 14 of the General Rules of Practice a disclosure of books, papers and documents relating to the merits or defense of an action may be had to frame a pleading or to enable a party to prepare for trial where the evidence is competent, relevant, material and necessary.

The cases in which such disclosure will be granted group themselves into three classes: Where the books, papers and documents are the foundation of the action; where the applicant has a special interest in the evidence and where the

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books, papers or documents, in which he has no special interest, contain evidence which the party desires to enable him to prepare his pleading or to prepare for trial.

The application, however, in any case will be granted only in the exercise of a sound discretion in the ascertainment of truth and the advancement of justice, but it must appear that the evidence is competent, relevant and material to the issues, unknown to the party seeking it and in the possession of the adverse party.

Such an application will be granted even in an equitable action for an accounting between the trustee of a corporation voluntarily dissolved and the executrix of a deceased trustee where the existence of the confidential relationship which is the basis of the accounting is admitted in the pleading.

MOTION by plaintiff for an order for the disclosure of books, papers and documents.

Wile, Oviatt & Gilman (Percival D. Oviatt, of counsel), for motion.

Charles L. Bauer, opposed.

RODENBECK, J. The plaintiff is entitled to the disclosure and inspection of the books, papers and documents desired for the purpose of preparing for trial. Section 803 of the Code of Civil Procedure and rule 14 of the General Rules of Practice authorize the disclosure of books, papers and documents relating to the merits or defense of an action for the purpose of framing pleadings or to enable a party to prepare for trial where the evidence is competent, relevant, material and necessary. The granting of the motion rests in the sound discretion of the court and it is difficult to abstract a general rule from the decisions which will apply to all cases.

The cases, however, in which such a disclosure will be granted may be grouped into three classes: *First*, where the books, papers and documents are the founda-

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tion of the action as for instance a written contract which a party desires but of which he has no copy (*Wesson* v. *Judd,* 1 Abb. Pr. 254; *Perrow* v. *Lindsay,* 52 Hun, 115; *Stilwell* v. *Priest,* 85 N. Y. 649); *second,* where the applicant has a special interest in the books, papers and documents such as that of a partner or that of one occupying a confidential relation (*Thomas v. Waite Co.,* 113 App. Div. 494; *Howlett* v. *Hall,* 55 id. 614; *Veiller* v. *Oppenheim,* 75 Hun, 21; *Fleischmann* v. *Fleischmann,* 31 Misc. Rep. 216; *Lord* v. *Spielman,* 13 id. 48; *Manley* v. *Bonnel,* 11 Abb. N. C. 123; *Kelly* v. *Eckford,* 5 Paige, 548; *Stebbins* v. *Harmon,* 17 Hun, 445; *Babbitt* v. *Crampton,* 1 Civ. Pro. 169; *Zimmerman* v. *Dieckerhoff,* 12 N. Y. St. Repr. 613); and *third,* where the books, papers and documents contain evidence which the party desires to enable him to prepare his pleading or to prepare for trial but in which he has no special interest. *Brownell* v. *National Bank of Gloversville,* 20 Hun, 517.

In the first two groups a disclosure and inspection is usually granted as a matter of course subject, however, to the rule that the necessity therefor must appear, while in the third group the party is required to make out a clear case that the evidence which he desires to examine is competent, relevant, material and necessary to enable him to frame his complaint or to prepare for trial.

The rule seems to have grown up in equitable actions for an accounting where there is an issue as to the right to the accounting, that a disclosure and inspection will not be ordered until that issue has been tried because if that issue is decided adversely to the party desiring a disclosure and inspection the necessity for it will disappear. *Conrady* v. *Buhre,* 148 App. Div. 776; *Moore* v. *Reinhardt,* 132 id. 707; *Fogarty* v. *Fogarty,* 128 id. 275. But this is a rule of procedure

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and should not be allowed to stand in the way of the ascertainment of truth and the administration of justice. In actions at law where an account is necessary, as for instance where the party is entitled to a share in the profits of the business as part compensation for his employment, a disclosure and inspection is allowed (*Webb* v. *Hedge Co.*, 133 App. Div. 420) whereas at common law no such disclosure and inspection was permitted except through the channels of the chancery court. This inconvenience has been removed but the requirement in our present practice that the application shall be made upon a petition is still a relic of the old procedure.

The application, however, in any case will be granted only in the exercise of a sound discretion in the ascertainment of truth and the advancement of justice but it must appear that the evidence is competent, relevant and material to the issues, unknown to the party seeking it and in the possession of the adverse party. *Pierce* v. *McLaughlin Real Estate Co.*, 121 App. Div. 501; *Ferguson* v. *Bien*, 49 Misc. Rep. 450; *Ward* v. *New York Life Ins. Co.*, 78 Hun, 336; *Bissell* v. *Mutual Res. Fund Assn.*, 38 Misc. Rep. 249; *Marx* v. *Pennsylvania Fire Ins. Co.*, 28 id. 490.

In the present case it is admitted that the defendant is the surviving director and trustee of a corporation which has been voluntarily dissolved so that upon that question there is no issue and in this respect the case differs from those cases where an issue as to the right to an accounting exists. It is true that the defendant claims that an adjustment and settlement was made with plaintiff's husband subsequently to the dissolution but she has no knowledge of such settlement and this issue can be determined perhaps by a disclosure and inspection of the books of the corporation and of the trustee charged with winding up its affairs. No rule of pro-

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cedure should stand in the way of enabling the plaintiff to obtain this information so that she may be prepared to try her case. Under the old common law practice except through the chancery court a party could not be compelled to disclose evidence and a witness could not be examined out of court but we are not now so tender of the rules of procedure and are giving more heed to the discovery of truth and the administration of justice. The motion is granted.

Motion granted.

Matter of the Application for the Appointment of a General Guardian of the Person and Estate of JOHN LONGER DE SAULLES, an Infant.

(Surrogate's Court, New York County, November, 1917.)

Surrogate's Court — jurisdiction of, to appoint guardians for infants — Supreme Court — statutes.

Jurisdiction — of Surrogate's Court — infants — divorce — guardians.

The jurisdiction of Surrogate's Court to appoint guardians for infants is concurrent with the jurisdiction of the Supreme Court and the court which first acquires jurisdiction in the orderly course of procedure should be protected in the exercise of its jurisdiction.

The jurisdiction of the Surrogate's Court to appoint guardians for infants is by statute made as extensive as the power of the former chancellor and the surrogate in making such appointments is bound by the principles prevailing in the former Court of Chancery.

Where by the terms of a decree of divorce the care and custody of an infant, the issue of the marriage, is limited to the joint lives of the parents, the decree has no possible operation after the death of either parent, in which event all matters of status of the parties and the infant are remitted to the common law, and where the infant is under the age of fourteen years the surrogate has jurisdiction to appoint a guardian for him.

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APPLICATION for the appointment of a guardian of an infant.

O'Gorman, Battle & Vandiver (James A. O'Gorman, of counsel), for petitioner.

Uterhart & Graham (George L. Ingraham, of counsel), for respondent.

FOWLER, S. This is a competent and well-directed application to this court, having jurisdiction of the application, to appoint a guardian of an infant. The learned counsel for the mother of the infant presents at the outset the traditional and current argument, in substance, as I understand it, that the application would be better off on general principles in the Supreme Court, and that it ought not to be entertained in this court for particular reasons which I shall hereafter notice at some length, because of their gravity.

The application for the designation of a guardian to this court in this proceeding is made by the nearest male representative on the side of the deceased father of the infant. It is opposed on the part of the mother of the infant. But these are the nominal parties to the proceeding. The infant, although treated as a *res*, is the real party concerned. The application is based on the petition of the uncle *ex parte paterna*. The mother of the infant has interposed an answer and an amended answer to such petition. These constitute the pleadings in this proceeding. The amended answer and the brief present questions of jurisdiction which, however, may always be taken *ore tenus*.

Whenever a suggestion of lack of proper jurisdiction for any cause is made in any legal proceeding in a court of justice, it is incumbent on the officer presiding or to whom it is addressed to dispose of it before

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proceeding to the merits of the controversy. The precise nature of the objection to my jurisdiction of the present application is contained in the brief submitted by my greatly esteemed friend, ex-Judge Ingraham, on the part of the mother resisting the application. I quote from the brief as follows: "Thus this application comes before the court, where it appears that the Supreme Court, a court having exclusive jurisdiction as to the custody of children in a controversy between the parents, where the action is for a divorce, has by its final judgment adjudged that the custody of this child should be awarded to the respondent. That judgment is under authority granted to the Supreme Court by section 1771 of the Code. The Supreme Court has also, as successor to the Court of Chancery, inherent jurisdiction to provide for and absolutely control the custody of infants confided to its care, and while the surrogate is given by the section of the Code cited the power to appoint a guardian of the person and property of an infant confided to its care, its power as to the custody of the infant must be subject to the control of the Supreme Court. It is the question of guardianship of either the person or property over which is vested concurrent jurisdiction. The question of the custody of a child after the appointment of a guardian is one that is vested solely in the Supreme Court, and that court would have jurisdiction at any time to decree that the custody of a child should not be confided to the guardian of its property, but to such other person as to the court would seem most conducive to the general welfare of the child."

If I understand the passage just quoted, it is in effect, inferentially, that the Supreme Court is the more authentic and suitable place, on general principles, to apply for a guardian of an infant whenever its parents have been in that court at any time. This

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inference is not, I think, justifiable. This is the old assumption which has made the jurisdiction of this court so anomalous in our judicial system, and to my mind so often impaired its usefulness. The Surrogate's Court is a court of record long invested by authority of the law-making power with the old chancery jurisdiction to appoint guardians of infants. To be sure, the legislature, when investing the surrogates with this jurisdiction, did not deprive the Supreme Court of a like power invested in it as general successor to the former equitable jurisdiction in this state, nor could it do so without an amendment to the Constitution of the state. But in the course of modern legislation would seem evident a tendency, I think, to regard the Surrogate's Court as the more appropriate place for the appointment of guardians of infants. If we have due reference to the history of the jurisdiction of Surrogates' Courts, we are at liberty to conclude that it justifies the tendency to commit the care of infants to judges invested with the peculiar and particular jurisdiction of the surrogates, rather than to the judges exercising the hurried, complex and hybrid general jurisdiction of law courts and equity courts combined. But this is a mere matter of opinion, of no importance to the merits.

The jurisdiction of Surrogates' Courts to appoint guardians is now concurrent with the jurisdiction of the Supreme Court. *Matter of Lee,* 220 N. Y. 539. When jurisdictions are concurrent I have yet to learn that one is superior to the other in any respect. It must be patent to everybody that where two courts have concurrent jurisdictions, that which first acquires jurisdiction in the orderly course of procedure should be protected in the exercise of its jurisdiction, and that conflicting orders of other courts invoked subsequently are greatly to be deprecated in an orderly

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state. The Surrogate's Court is in this instance the court first applied to. But as the vindication of the surrogate's jurisdiction over infants in the last analysis always rests with the Supreme Court, the degree of regularity and comity rightly to be expected by the community in cases of conflicts of jurisdiction, therefore, depends wholly on the action of the Supreme Court under our present system. The surrogate is thus rendered powerless to protect his own jurisdiction. This is another anomaly of the present judicial establishment. These anomalies are at times serious and sometimes degenerate into absurdity.

It is quite unnecessary at this time to go into the nature of the present jurisdiction of the Surrogates' Courts. It is sufficient to point out that they are courts of record, as Blackstone said, of a peculiar and particular kind, but though particular and peculiar in kind invested with one of the most extensive and ancient, original and exclusive jurisdictions known to our jurisprudence. It is to be observed that the nature and the powers of any court in this country are to be found only in the history of its jurisdiction. The court is nothing; the jurisdiction is everything. The history of jurisdiction was formerly much better understood in this country than at present. The old practice books published in this state in the early part of the preceding century are much more illuminating and instructive on matters of the jurisdiction of the Supreme Court and the Court of Chancery than are later commentaries. That the Surrogates' Courts of this state, although not now adequately protected by legislation, are invested with a sufficiently great jurisdiction to entitle their decrees to more consideration than they sometimes receive from other courts is readily apparent.

While vested with the chancellor's jurisdiction to

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appoint guardians, there are some points made in the adjudications of other courts about the extent of the surrogate's power to control and direct the very guardian he designates. There was nothing in the law which so limited the surrogate's power, but the point has been made in other courts on some general principle I think not well founded. In legal theory the Surrogate's Court is not possessed of an inferior or trifling jurisdiction. In the country from which the surrogates' ready-made jurisdiction was transplanted as the product of centuries of legal conflict among English speaking peoples, very great judges, quite the equals of the common-law judges in England, have wielded the peculiar jurisdiction in question. A jurisdiction which has been exercised at intervals by such celebrated judges as Sir John Nicholl, Lord Stowell, Sir Herbert Jenner, Sir H. Jenner Fust and the late Lord St. Helier, and in this country by such profound judges as Surrogate Bradford and Surrogate David B. Ogden (before his surrogateship, regarded by his contemporaries as not second to Webster at the federal bar), cannot rightly be treated as an incompetent jurisdiction in discipline or in kind. Nor ought it be regarded as incompetent for the discharge of such ordinary judicial functions as the appointment of guardians. I regret that I cannot in justice to the jurisdiction conferred remit this application to the Supreme Court as requested for the further action of the learned justices sitting across the thoroughfare. As surrogate I have jurisdiction of this application, and as this jurisdiction has been duly invoked primarily I ought not to decline it, and indeed cannot rightly decline it in the due discharge of the obligations of my office.

The reason for such an unusual application as to decline jurisdiction is, I think, partly attributable to

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some anomalies in the present situation of the judicial establishment in this state. The Surrogate's Court, although invested with the most extensive jurisdiction, as now amended and augmented, ever known in like courts is at times allowed to exercise no independent judicial discretion in many matters pending in this court. The discretion of this court by statute may be disregarded without even an assignment or pretense of errors. So in instances, the surrogate is authorized to render judgments which may by other statutes be disregarded and treated as a nullity, without even an assignment or pretense of error. For the law-making body to confer extended jurisdictions on a court so hampered and limited is the acme of absurdity in the science of government. In my private capacity I have no longer any interest in any such matter, but as a constituted judge I am bound to consider all matters affecting the jurisdiction committed to me. Passing all this, which ought, however, to be of some general interest to practicing lawyers in any scientifically organized and constructed state, I will proceed again to take up the merits of this particular application.

The amended answer sets up in bar of this application a prior adjudication of his Honor, Mr. Justice Finch, rendered in the Supreme Court of the state of New York. It appears that in an action brought by the mother against the father of the infant a decree of divorce *a vinculo* was entered in or about May, 1917, by the tenor of which it was provided as follows:

"Ordered, adjudged and decreed that the defendant pay to the plaintiff for her support and maintenance and for the support and maintenance of the issue of said marriage, John Longer de Saulles, Jr., the total sum of three hundred ($300) dollars per month, payable the first day of each month after the entry of this decree at the office of Prince & Nathan, New York City,

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or such other place as plaintiff may designate in writing. If the plaintiff shall remarry, then the defendant shall not be required to make further payments to the plaintiff for her support and maintenance, but shall thereafter continue to pay to the plaintiff for the support and maintenance of the said child, unless the said child shall previously have attained his majority, the sum of one hundred and fifty dollars per month. After the said child shall have attained his majority the defendant shall not be required to make any further payments to the plaintiff for the support and maintenance of said child, but shall continue to pay to the plaintiff the sum of one hundred and fifty dollars per month for her support and maintenance, as hereinbefore directed, unless she has previously remarried. It is further

"Ordered, adjudged and decreed as follows:

"1. Until England is at peace and the seas are safe for travel, John Longer de Saulles, Jr., the only child of the parties hereto, shall not be removed by either of his parents, nor shall either parent permit him to be removed from the United States of North America, and during such period the care and custody of said child shall be and is hereby awarded as to each year seven-twelfths of the time to the plaintiff and five-twelfths of the time to the defendant. The five-twelfths of each year during which the defendant shall have the custody of said child as aforesaid shall consist of separate periods of time, no one of which shall exceed one month in duration, unless the plaintiff shall agree in writing that said periods or any of them may be longer, and the dates of the beginning and the end of each of said periods shall be fixed by the defendant, but the defendant shall, at least two weeks prior to the beginning of any such period, give notice in writing to the plaintiff of the date of beginning and of the ending thereof.

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" 2. After England is at peace and the seas are safe for travel and until said child shall attain the age of eight years, the care and custody of said child shall be and is hereby awarded to the defendant during the months of June to October, inclusive, in each year and to the plaintiff during the balance of each year; and the plaintiff shall be at liberty during all or any part of the period of seven months in each year when she is entitled to the care and custody of said child, to remove said child to England and there to maintain him, returning again with him, or sending him in the custody of some responsible person to the United States of North America, so as to arrive therein at or before the conclusion of the said period. Neither the plaintiff nor the defendant shall remove said child to or maintain said child in any other country than the United States of North America or England, unless the written consent of the other party hereto shall first have been given thereto.

" 3. After the said child shall attain the age of eight years the defendant shall have the sole charge and direction of his education, which shall be at the defendant's expense.

" The care and custody of the said child from and after the time when he shall so attain the age of eight years shall, save as hereinafter provided, be, and it hereby is, awarded to the defendant during the months of October to June, inclusive, in each year, and to the plaintiff during the balance of each year; provided, however, that should the annual term of the school, college or other educational institution which the child may at any time be attending or which the defendant proposes that the said child shall attend, for the current or ensuing school year begin earlier or later than the first day of October or end earlier or later than the first day of July, as the case may be, then the periods

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during which the plaintiff and the defendant shall respectively have the care and custody of said child shall be enlarged or diminished accordingly, so that the plaintiff shall have the care and the custody of said child during the summer vacation and the defendant shall have the care and custody of said child during the annual term of such school, college or other educational institution; and provided further, that during the respective periods when either the plaintiff or the defendant shall be entitled as aforesaid to the care and custody of the said child, the other party hereto not then having the care and custody of said child shall be entitled to remove the said child from the care and custody of the other party, and to keep said child in his or her care and custody for half of the time during which the other party would otherwise have the care and custody of said child, but that neither party so removing said child from the custody of the other shall keep or maintain him away from the custody of the other for a longer period than one month at any one time, and that either party so removing and keeping said child shall, at least two weeks prior to the time of such intended removal, give notice in writing to the other of the date of such removal and of the date when such child will be returned to the custody of the other party. Neither party so removing such child from the custody of the other party for such period or periods of one month or less shall remove or keep him outside of the country where he was at the time of such removal, nor shall either party exercise such power of removal of the child from the custody of the other party in such manner or under such circumstances as to interfere with the said child's attendance at school, college or such other educational institution as he may then be attending.

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"During the time when the plaintiff is entitled to the care and custody of said child (that is, during the months of July, August and September, or the summer vacation as aforesaid), the plaintiff may remove and keep said child in England, returning again with him or sending him in the custody of some responsible person to the United States of North America, so as to arrive therein at or before the conclusion of said period.

"Neither the plaintiff nor the defendant shall remove said child or keep or maintain said child in any other country than the United States of North America, or England, unless the written consent of the other party shall first have been given thereto.

"4. While the child is in the custody of either the plaintiff or the defendant, as aforesaid, under the provisions of any of the preceding paragraphs '1' to '3,' inclusive, and whether within or without the United States of North America, as the case may be, the other party not then having the care and custody of said child shall, in addition to being entitled to such care and custody thereof, as is hereinbefore provided, be permitted at any time or times when it will not interfere with the proper care of the child by the other party, and within reasonable hours and upon reasonable notice to the other party, be permitted to visit the said child and to remove the said child from the custody of the other party for a period of not exceeding three hours at any one time, returning said child to the custody of the other party at the conclusion of said period.

"5. Each party hereto, while the child is in his or her custody, shall keep the other party at all times informed as to where the said child is being kept or maintained."

Such is the tenor of the decree in the Supreme Court.

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The question now presented is, Is this decree of the Supreme Court set forth above a bar to the exercise of my judicial action in the present proceeding? On examination it purports, I think, to be a decree fixing the custody of an infant, the issue of the dissolved marriage, only during the joint lives of the parties to the action and the minority of the infant. The decree does not appoint a guardian of the child. Such decree was rendered in a divorce action in which a marriage status was the veritable *res* in the contention. The decree incidentally only fixed the custody of the child of the marriage and it partitioned the rights to its control and custody between the parents of the unhappy child during such period and no longer. To decree a custody beyond such a period would be futile. If the decree, as argued, is now in force it must be in force in its entirety and the deceased parent continues entitled to control during the prescribed portion of the year, which is an absurdity. I have yet to learn that the Supreme Court, although for two centuries a great and useful factor in the upbuilding of the important common-law community, has ever before assumed the power to determine or enforce the rights *qua* rights of those who dwell in the regions of the immortal. It is a universal principle of law, without a single exception, that at death the rights of a deceased either cease absolutely or devolve *eo instanto* on the living. I am satisfied that the decree of the Supreme Court could have no rational or legal operation beyond the joint lives of the parents.

But if the decree has a longer operation as contended, how far were the rights of the male stock of the parental family of the infant adjudicated in such divorce action mentioned? A divorce action is one *in rem;* it alters a *status* of two persons for the future, but the only *res* involved in the action is the *status* of

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the spouses. As to this single matter, the decree of divorce would be binding on all the world whether parties or not. As to the custody of the infant, the judgment is in another situation. It is not *in rem* and is, therefore, not binding on those not parties to it. The power of the judges of the Supreme Court to provide for the control of infants in a divorce action is wholly statutory, and is due to a statute first enacted in 1815, consolidated in the original Revised Statutes. 2 R. S. 148, § 59; *Livingston* v. *Livingston,* 173 N. Y. 377, affg. 74 App. Div. 261; *Sistare* v. *Sistare,* 218 U. S. 1, 20.

The paternal stock of the infant were not bound by the part of the decree not *in rem,* even if it attempted to fix the custody of the infant beyond the joint lives of the parents. If the male stock of the infant's family have any rights of custody and control over the infant of their race during the mother's lifetime, it is therefore open to them to assert them here, *non obstante* the decree in the divorce action. But there is another and more delicate consideration submitted to me. If the Supreme Court has attempted to adjudge the control and custody of the infant beyond its father's lifetime, even though without authority so to do, it might be indecorous for me to correct it or to entertain the present application. In that event Judge Ingraham's suggestion that the surrogate should not act in this matter at this time is entitled to much consideration from me. But I am satisfied that the decree of the Supreme Court adjudging the control of the parents and their issue could not intend any operation beyond the death of either parent. Certainly it could have no possible operation after the death of the father and it is but fair, I think, to the Supreme Court to presume that it did not intend to do what it could not do. On the happening of the death of the father all matters of status

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of the parties and their infant ceased to be affected by the decree of divorce and were remitted to the common law, which alone fixed their further status. The decree in the divorce action, in other words, ceased on the death of the father to have any further future operation in my humble opinion. This being so, there is no valid reason why I should not entertain the present application, and indeed I should be derelict in my duty if I declined so to do.

The surrogates' jurisdiction over infants was first conferred by a statute of 1802. The present statute is more modern in phraseology. Code Civ. Pro. § 2643. In *Matter of Wagner,* 75 Misc. Rep. 419, 425, I referred to the fact that the statutory power of the surrogate to appoint guardians was made by express limitation as extensive as the power of the former chancellor. There was great good sense in this legislative reference to the power of the chancellor, as the former chancellors had a prescribed canon, practically closed, determining every principle on which the appointments of chancery guardians should proceed in all instances. The subsequent decisions on chancery guardianships in this state, although many, certainly have evolved nothing new or original. Their predecessors, the chancellors, had covered the whole ground in their usual formal, stately and conclusive fashion.

It is obvious from its terms that the statute intended to confer on the surrogate the power to appoint what were formerly known as " chancery guardians " only. The surrogate can appoint no other kind of guardians, except special guardians, who are merely ordinary guardians *ad litem.* A chancery guardianship is a temporary parent of a particular kind. At common law guardians were of several varieties. The father, and afterwards the mother in special cases, were at common law guardians by nature and nurture which

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denoted the personal rights to the custody and care of their infant child's person, or at least of the eldest male child's person. A guardian in socage referred to the estate in lands of the infant and could not by any possibility devolve on any one entitled to the succession to the lands. A testamentary guardian, sometimes called a statutory guardian, was one created by last will of the father, and in this state now of the mother, the father being dead. Both guardians in socage and testamentary guardians linger on in our law. But all these common-law guardianships, after the abolition of tenure, tended both in this state and in England to be supplanted by the guardians designated by the chancellor, the official general and supreme guardian of all infants. I have had occasion often in this court to consider this subject, and need not dwell on it. *Matter of Scoville,* 72 Misc. Rep. 310, 313; *Matter of Wagner,* 75 id. 419; *Matter of Mancini,* 89 id. 83. As already remarked, the law regulating chancery guardians was practically a closed canon when the surrogates were invested with the power to appoint "chancery guardians" as fully as the chancellor could have done in this state. There are many recent decisions reported, but I detect no new principles enounced, even in the highest quarter. What then are the occasions when the chancellor could and would appoint guardians for infants, for this is made the precise measure of the surrogates' present authority? After the case of *Wellesley* v. *Duke of Beaufort,* 2 Russel, 1, in England, and *Wood* v. *Wood,* 5 Paige, 605, in this state, it was recognized that the chancellor could supplant pretty much all common-law guardianships if a proper case was made. This left the only question, When is a proper case made? Principles which would bind and control the chancellor would bind his statutory successor, the surrogate. In

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modern law chancery guardianships are the more common form.

In this matter now before me at the present moment, the mother is temporarily, at least, incapable of having the custody or control of either the person or property of the very young child of her former marriage. The mother for the moment is in the position of one civilly dead. The child is thus left subject to no legal control or care whatever, the father being actually dead. There is no other human being now in existence who has either legal authority to care for the child or who is legally responsible for its nurture and well-being. The child is thus in the position of a waif, yet it has an estate and has had traditionally at least good home surroundings, both of the parents having been, I understand, well circumstanced. In equity a parent who is incapable for any cause of taking care of her child is *prima facie* unfit to have its custody. This was the chancery rule. Thus the situation presents the very case where the child would have fallen under the superintending influence and control of the former chancellor by mere operation of law. As his actual control existed only in legal theory, the chancellor would have at once exercised his power to appoint a guardian of the infant, either *suo motu*, or on a direct application. To be sure the mother's disability in this matter above indicated may not endure permanently, but at present it exists and it is not possible, nay, it would be highly reprehensible, for a judge, expressly invested with the chancellor's power to remedy the infant's present situation, to decline for any reason to act in the premises, even though the request not to act was based, as here, on an appeal to sympathy and clemency for one laboring under great misfortune. This plea should be addressed to the promovents in this matter. I regret that it cannot

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properly be entertained by the surrogate in a pending proceeding in his court.

The mother being incapable, for the moment at least, of caring for the infant in court, the next question here is as to the superior right of the paternal relatives to receive the temporary guardianship of an infant of their race and name. The jurisprudence of the common law, as every other system of jurisprudence, has a complete scheme of family law, sometimes explicit and at others implicit, but always adequate. At common law as a general principle the rights of the male stock are regarded as superior to those of the female; the wise and conservative common law of our race did not regard marriage as a mere partnership in which the partners enjoyed equal rights. Nor does it now regard the guardianship of infants as well bestowed when given to maternal relatives in preference to the paternal relatives. Chancellor Kent states that in chancery the order of appointment of guardians of the person is first to the paternal grandfather, if any; next to the maternal grandfather, if any; then to the paternal uncles, and last to the maternal uncles. While this order presented is not now invariable in this country it is entitled to attention here, in view of the terms of the jurisdiction conferred on the surrogate.

In this matter neither grandfather applies. The paternal uncle being next in order does apply, and his prior right to custody is entitled to close attention before it is disregarded. The rights of the paternal stock are in the family law of this state superior to that of the mother. The common law is the fundamental law of this state, and it is not to be ignored on some theory that more modern judicial conceptions are superior to it. It is the common law of English-speaking peoples, and not our peculiar political institutions, which has perfected our civilization and made success-

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ful even our political institutions. But the prior right of the paternal relatives in chancery was subject to the ordinary limitations; they must have been proper persons in character and position before the custody of the infant would be relegated to them by the chancellor. The practice in chancery was first to require a master's report, approving of the person and the security offered. This was but common prudence in the exercise of a jurisdiction at once so serious and so responsible.

In accordance with settled principles I should grant the application of the uncle. But the amended answer sets up that he is not a fit and proper person and that his ordinary residence has been the scene of debaucheries in times past. This raises a distinct issue which must be tried out before the application would be granted by the chancellor. Such an appropriate practice implicitly follows the proper exercise of jurisdiction by the surrogate. While I have the power to refer the hearing of such issue, as was formerly done, it has been my practice in this class of cases to take the evidence myself in order that I might inspect the parties and their witnesses. I shall accordingly set this matter down for hearing before me upon two weeks' cross-notice given by the parties.

The appointment of a guardian in this matter is occasioned by reason of the mother's present disability. If that disability is removed the mother is *eo instante* remitted to her common-law control and right to custody. *Matter of Deming,* 10 Johns. 232, 483. I do not quite understand why the Supreme Court originally saw fit to deprive the mother, being the innocent party to the divorce action, of the sole custody of her infant under fourteen, ordinarily granted to innocent parties. No doubt there were good reasons. In England special acts of Parliament were regarded as

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necessary to alter the common-law rights of parents to custody, *e. g.*, 2 & 3 Vict. chap. 54. The New York acts on this subject do not go so far as the English acts.

Meanwhile, if any immediate or temporary order committing the infant to judicial custody and control is necessary, it is agreed, I understand, on the part of the maternal relatives and not opposed by the paternal relatives, that Mrs. Louisa V. Hecksher (with whom the infant now is) is a proper custodian, and an order to that effect can be entered. I should like the order to provide that the mother may see the infant whenever permitted, although there is some question made, notwithstanding the express terms of the surrogate's jurisdiction, on his power to do anything but nominate guardians. In Pennsylvania the Orphans' Court is not so limited, and until I am advised by the final decisions of the courts of this state to the contrary I shall assume that I have the ordinary power of control over guardians I am called upon to appoint.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of Proceedings of ALICE LOUISA RIPLEY, as Executrix, and EMERSON FOOTE, JR., as Executor, of the Last Will and Testament of HARRY DILLON RIPLEY, Deceased.

(Surrogate's Court, New York County, November, 1917.)

Trustees — rights of testamentary — who competent to serve — wills — aliens — statutes — Laws of 1914, chap. 443.

The rights and status of a testamentary trustee flow exclusively from the will and not from the letters of trusteeship issued upon the probate of the will.

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Prior to the enactment of chapter 443 of the Laws of 1914, which provides that no person is competent to serve as a testamentary trustee who is an alien not an inhabitant of the state, an alien was competent to take a trusteeship of personalty.

Said statute is not retroactive and does not apply to the qualifications of persons named as trustees in a will probated prior to the enactment of said statute.

PROCEEDING upon the judicial settlement of the account of executors.

Malcolm R. Lawrence, for Alice Lousia Ripley.

Edward D. Bettens, for executor and executrix and for the three trustees under the will of Harry Dillon Ripley.

Daniel J. Mooney, special guardian for Harry Dwight Dillon Ripley.

FOWLER, S. This is an accounting proceeding, Alice Louisa Ripley and Emerson Foote, Jr., having filed their account as executors of the estate of the decedent. There is no objection to the account, but on the settlement of a proposed decree the special guardian for an infant remainderman and the attorney for the life beneficiary of a trust fund object to that part of the proposed decree which provides for the payment of the principal of the trust fund to Alice Louisa Ripley, Emerson Foote, Jr., and Benjamin Worthy Horne as trustees. The objection is specifically directed to the inclusion of the name of Benjamin Worthy Horne as one of the trustees. The objectants allege that Mr. Horne is a nonresident alien and contend that he is not competent to act as trustee of the trust fund created

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by the will of a resident of this state. This is practically the one point now here for my consideration.

The testator died on February 8, 1913, and nominated and appointed Alice Louisa Ripley, Emerson Foote, Jr., and Benjamin Worthy Horne executors and trustees of his will. Benjamin Worthy Horne resides in London, England, and is not a citizen of the United States. My recollection is that when this estate was before me at some earlier stage it appeared that the late Mr. Harry Dillon Ripley resided in London and had property in England when he died. Mr. Horne did not attempt to qualify as executor in this jurisdiction, but he has now filed his consent to act as one of the trustees of the trust fund created for the benefit of Alice Louisa Ripley. Mrs. Alice Louisa Ripley at one time desired that Mr. Horne be recognized as a trustee under the will of her husband, but she seems lately to have changed her mind, if I am not misinformed. The question of law raised by the objection to the inclusion of his name in the proposed decree for distribution is whether this court should decree that the executors pay the principal of a trust fund in their possession to trustees jointly when it appears that one of them named as trustee in the will of the testator is a nonresident alien.

It happens that the point of law involved in this matter is of importance not only to the particular actors in this proceeding, but to many other Americans now residing in England. Being informed of this, I do not wish the point of law to pass at this time *sub silentio,* nor do I wish to embarrass those not before me by hasty or ill-considered action in this matter upon a point of law of general importance. Incidentally I have learned that other counsel of great eminence in their profession have given opinions on this point now

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here. I have not, however, had the advantage of seeing them, nor do I know their purport.

In coming to a conclusion much depends, I think, on the nature of the alleged disability of the foreign testamentary trustee and the time when such disability accrued. If the disability springs wholly from a late statute, taking effect subsequently to the will itself, the statute may not be retroactive in operation. If the trust was created by the will only, and not by virtue of some action in this court, then the disqualification, if the statute is retroactive in operation, may have to be availed of in an independent proceeding. I shall consider each of these points in turn.

My present impression is that under the will of the late Mr. Ripley, Mr. Horne was vested with a trusteeship quite independently of any authentication of the will itself in this court. In other words, Mr. Horne's rights and *status* as trustee flow exclusively from the will and not from the adminicular proceedings on the will taken in this court. *Smith* v. *Miles,* 1 T. R. 475, 480; 1 Wms. Exrs. 214; *Dunning* v. *Ocean Nat. Bank,* 61 N. Y. 497, 501. Neither probate nor letters of trusteeship are the foundation of Mr. Horne's trusteeship; on the contrary, the will itself is the sole foundation. *Harnett* v. *Wandell,* 60 N. Y. 346, 349, 350; *Van Schaack* v. *Saunders,* 32 Hun, 515, 520; *Matter of Greeley,* 15 Abb. Pr. (N. S.) 393, 395; *Dunning* v. *Ocean Nat. Bank,* 61 N. Y. 497. Probate does not constitute a testamentary trustee; it is the will alone. *Dunning* v. *Ocean Nat. Bank,* 61 N. Y. 497, 502.

There is a fundamental distinction between the office of an executor and that of a testamentary trustee. Redf. Sur. 269, 360, 408, 409. My references to this learned author are to the fifth edition of his work, as that was from his own careful and discriminating hand. Formerly the Surrogate's Court had no authority to

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issue letters of trusteeship separately from letters testamentary. It cannot, I think, be pretended, even now, that an English trustee of testator's English estates, if any there now are, would be required to take out letters of trusteeship in this jurisdiction, even though this be the *forum domicilii* or place of original probate of the will. The distinction between an executorship and a trusteeship is made plain when we consider that the same person may continue in one office and be removed from the other. *Matter of Hood,* 98 N. Y. 363; *S. C.,* 104 id. 103, 107.

Nor does it matter that Mr. Horne did not after probate qualify as an executor. It is well understood that a declination of an executorship is not a declination of a trusteeship conferred by the will. Redf. Sur. (5th ed.) 270, citing Wms. Exrs. Nor does an acceptance of an executorship necessarily imply an acceptance of the trusteeship conferred by the will. The refusal of an executor to accept the trusteeship may always be proved by parol. *De Peyster* v. *Clendining,* 8 Paige, 310. The trusteeship given by the will of Mr. Ripley to Mr. Horne was not inseparably annexed to his office of executor. *Dunning* v. *Ocean Nat. Bank,* 61 N. Y. 497.

There is doubtless some modern authority for the position that a testamentary trusteeship depends on the prior authorization of a court having jurisdiction of the probate of the will. Learned counsel cite to me Perry on Trusts (§ 262) in support of this proposition. This modern work is unavoidably tempered by current notions prevalent in many states. We are too apt to overlook what is well understood elsewhere, that juridical thinking is much affected by contemporary current tendencies. Let us look back for a moment at the growth of the conception that a testamentary trusteeship is dependent on the ratification by the court

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having jurisdiction to probate the will and ascertain if possible what the conception really is worth and what it stands for in reality. The growth of the juridical conception that a testamentary trusteeship, or an executorship even, is due to the court authenticating the will is wholly modern and is a part of the philosophical apparatus of the modern bureaucratic state. It is now generally recognized that all modern states tend to this form and the courts tend to follow. For this reason jurists on the continent of Europe pay much attention to the current philosophies and metaphysics which they say subconsciously shape all modern juridical thinking. No doubt they are more potent than we assume in this country. I should, however, be very sorry to believe that the socialistic conception of the bureaucratic or administrative state had gained much ground even subconsciously in our courts of justice. Unfortunately there is some evidence that it has to some extent. One is the late juridical theory that property emanates from the state; another that a will is *venia testandi* or the product of the state; a third is the assumption that courts of justice have the inherent power to transfer legal title to property *in custodia legis* without the intervention of the holder of the legal title; a fourth is that offices conferred by wills are really due to the approval of administrative courts authenticating the will. I could enumerate other instances, but these will suffice for illustration. It is manifest that every one of these modern juridical concepts just denoted is in direct conflict with the fundamental traditions and with the common law of English-speaking peoples — so much so that they tend to alter the whole theory of the relations which the modern courts of justice bear to common-law communities. I do not hesitate to offer these observations, although not of the conventional judicial type, because they are

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not irrelevant to the present contention, which is founded wholly on modern conceptions closely associated with the bureaucratic tendencies of the modern administrative state. They have no foundation in our common law.

That every judge, in every system, has, consciously or unconsciously, as the foreign jurists assert, a current metaphysic and social philosophy which tempers and controls his juridical thinking is probably true. Otherwise the judge's application of decided cases by analogy to modern instances would be a mere traditional system of abstract logical inferences, devoid of morale and devoid of solid causative reasons *ex aequo et bono*. If we leave out of the account the modern tendencies denoted and follow the prior adjudications cited, as we are bound to do, allowing the common law only to furnish our juridical philosophy as we ought to do, then it would seem clear that Mr. Horne's title to the trusteeship in this estate does not depend on its authentication by this court, but rests solely on the will of Mr. Ripley. With this conclusion as a premise, we may proceed to consider the nature of the alleged disability of Mr. Horne to receive jointly the trust fund.

At the time Mr. Ripley's will took effect Mr. Horne was not disqualified from acting as trustee under Mr. Ripley's will. An alien was at common law competent to take a trusteeship of personalty. *Duke of Cumberland* v. *Graves*, 7 N. Y. 305. Chapter 443, Laws of 1914, first provided that no person is competent to serve as a testamentary trustee who is an alien not an inhabitant of the state. Code Civ. Pro. § 2564, as amd. The act of 1914 was not, I think, retroactive in operation. The rule is firmly settled in this state that a law is never to have a retroactive effect if its language can be satisfied by giving it prospective operation only. *New York & Oswego Midland R. R. Co.*

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v. *Van Horn*, 57 N. Y. 473, 477, 478; *Jacobus* v. *Colgate*, 217 id. 235; *People* v. *Wendel*, Id. 260, 263; *Rhodes* v. *Sperry & Hutchinson Co.*, 193 id. 223; *Boswell* v. *Security Mutual Life Ins. Co.*, Id. 465; *People ex rel. Provident Sav. Life Assur. Soc.* v. *Miller*, 179 id. 227.

If, as claimed, Mr. Horne has become incompetent to continue to act as trustee by reason of the subsequent legislation of this state, his removal can be sought in an independent proceeding to that end. Code Civ. Pro. §§ 2569, 2570, 2571. His vested interests ought not to be disturbed in some collateral proceeding. In a direct proceeding Mr. Horne's alleged disqualification may be the subject of a more serious consideration than is afforded on a mere settlement of a decree in a collateral proceeding.

It is apparent, I think, from the authorities that Mr. Horne was not originally incompetent to take the trusteeship conferred on him by the will of Mr. Ripley, and that he was vested with it by the ordinary operation of the will itself. Let me summarize my present conclusion: Chapter 443 of the Laws of 1914, which amended the provisions of the Code relating to Surrogates' Courts, first provides (Code Civ. Pro. § 2564) that no person who is a nonresident alien is competent to serve as a testamentary trustee. Prior to that amendment there was no provision of the Code prescribing the qualifications of a testamentary trustee, but section 2817 provided that a testamentary trustee could be removed if he was disqualified or incompetent to act as executor. A nonresident alien was incompetent to act as executor. As Mr. Ripley died prior to the enactment of chapter 443 of the Laws of 1914, the amendment affected by that chapter does not apply to the qualifications of the persons named as trustees in his will. A person named as trustee in the will derives

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his authority wholly from the will, and until he has been removed by this court it would seem that he is entitled to assume the responsibilities and perform the duties of trustee. As the executors have accounted for the principal of the trust fund and ask the court to direct that it be paid over to the trustees, and as it appears that the foreign trustee named in the will has not been removed by this court, the decree is correct in providing for the payment of the trust fund to the three trustees jointly. This of course is without prejudice to any subsequent independent and direct proceeding to remove the nonresident trustee. *Lane* v. *Lewis,* 4 Dem. 468.

I observe incidentally that there is a supplemental account in this proceeding. It is a rule of this court that a supplemental account cannot be settled without a new citation or waiver by all concerned. Here there can be no waiver, for there appears to be an infant in court. But I should like to hear counsel again on this point. There appears to be also some question as to the amount of costs and allowances. On these two points I desire to hear counsel before signing the decree. I should be much obliged if they would therefore appear before me again at my chambers at ten-thirty A. M. on a day to be fixed by them, giving two days' cross-notice of hearing. I shall then proceed on the grounds partly stated to settle and make the final decree required in this proceeding.

Decreed accordingly.

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SILAS DECKER and Another, Plaintiffs, v. WALTER D. HOAG et al., Defendants.

(Supreme Court, Kings Special Term, November, 1917.)

Partition — of real property — who entitled to bring — wills — actions — evidence — religious corporations — Decedent Estate Law, § 17. Wills — codicils — intention of testator — legacy — residuary estates.

C., who died a resident of New Jersey possessed of personal property and seized of real property in New York and New Jersey, by his will gave most of his property to his executors in trust to receive the income and pay it over to a New Jersey religious corporation for certain purposes. The Court of Appeals held that such disposition of the property was within section 17 of the Decedent Estate Law forbidding a person having a husband, wife, child or parent from giving more than one-half of his or her estate to charitable, educational or religious institutions; that the whole estate wherever situated must be taken into account in determining how much of the real property in New York testator was authorized to give to said religious corporation and that if, under the law of New Jersey, said corporation was entitled to receive the personal property and the real property situated in that state which exceeded in value the real property in New York then the real property in New York passed to the heirs of C. At the trial there was uncontradicted testimony that under the law of New Jersey there was no limitation upon the right of said religious corporation to take the New Jersey real property and personal property. *Held,* that the real property in New York descended to the heirs of C. and they were entitled to bring an action for the partition thereof.

Prior to the death of C., his brother T., who survived him but has since died, made a will which contained the following clause: "*Ninth.* I direct that if after all my just debts and funeral expenses are paid it is found that there is not a sufficient amount remaining to pay in full the sums to the persons herein mentioned, then said persons are to receive the sums in proportion to the amounts set opposite their names, and providing there is a remainder after all just debts and persons have been fully satisfied, as heretofore named, then said remainder is to

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be divided *pro rata* among" the said designated persons. About ten months after C.'s death T. executed a codicil to his will ratifying and confirming the same and making the payment of certain legacies a charge upon his estate. *Held*, that reading the will and codicil together, and regarding the former as republished as of the date of the latter, it was the intention of T. to dispose of his entire estate and he intended his residuary estate, whether real or personal, to go to the persons named in the ninth clause of his will and that he used language sufficient to effectuate that intention.

ACTION for partition.

Merle I. St. John, for plaintiffs.

William D. McNulty, for defendants Hoag and George C. Vreeland, individually and as executors.

George R. Brennan, for defendant Jacob R. Decker, and guardian ad litem for infant defendants.

Griggs, Baldwin & Baldwin (Martin Conboy of counsel), for defendant Frederick N. Vreeland, as executor, etc., and others.

Edmund A. Statler, for defendant North New Jersey Baptist Association.

BENEDICT, J. This is an action for the partition of real property. The complaint was dismissed on the first trial, but on appeal to the Court of Appeals from a judgment of the Appellate Division, affirming the dismissal, the judgment was reversed and a new trial ordered. The real property in question was part of the estate of Conrad Vreeland, deceased, who died a resident of New Jersey, possessed of personal property and seized of real property in New York and New Jersey. He left a will by which, with slight exceptions,

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he gave all his property to his executors in trust to receive the income and pay it over to the North New Jersey Baptist Association for certain purposes. It was held by the Court of Appeals in substance that this disposition was within section 17 of the Decedent Estate Law forbidding a person having a husband, wife, child or parent from giving more than one-half of his or her estate to charitable, religious or educational institutions; that the whole estate wherever situated must be taken into account in determining how much of the real property in New York the testator was authorized to give to the North New Jersey Baptist Association, and that if, under the law of New Jersey, the association was entitled to receive the personal property and the real property situated in that state, which exceeded in value the real property in New York, then the New York property passed to the heirs. There was uncontradicted testimony at the trial that under the law of New Jersey there was no limitation upon the right of the association to take the New Jersey real property and personal property. It follows, therefore, that the real property in New York descends to the heirs, and that this action is therefore properly brought. Counsel for the executors of the will of Conrad Vreeland has submitted no brief, and so I do not know whether he desires to contest this point. But under the decision of the Court of Appeals there appears to be no escape from the conclusion reached. The fact that no income had actually been paid to the association is unimportant. The New Jersey real property alone exceeded in value the New York real property.

The next question which requires consideration is as to the construction of the will of Thomas B. Vreeland. He was a brother of Conrad Vreeland and was living at the latter's decease, but has

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since died. Prior to the death of Conrad, Thomas made a will in which, in substance, he provided as follows: After giving direction as to his funeral expenses, debts and burial plot, he directed that his friend Russell B. Zabriskie select himself a home, not to exceed $3,500 in cost, and that his executor see that Russell B. Zabriskie be granted a "warranteed" deed thereof and that "the said home be paid for out of the proceeds of my estate." A similar clause for the benefit of Ernest C. Zabriskie follows: Then follow some monetary legacies, among them one of $1,000 to Lydia L. Vreeland, and other provisions not material, and finally this clause: "*Ninth.* I direct that if after all my just debts and funeral expenses are paid it is found that there is not a sufficient amount remaining to pay in full the sums to the persons herein mentioned, then said persons are to receive the sums in proportion to the amounts set opposite their names, and providing there is a remainder after all just debts and persons have been fully satisfied, as heretofore named, then said remainder is to be divided *pro rata* among Russell B. Zabriskie, Ernest C. Zabriskie and Lydia L. Vreeland." Frederick N. Vreeland is appointed sole executor. About ten months after Conrad's death Thomas executed a codicil to his will, "which will," he says in the preamble, "I do ratify and confirm, and the purpose of this codicil is to more plainly explain the third and fourth clauses of my said will. In the two clauses aforesaid I have empowered my executor therein named to pay to Russell and Ernest Zabriskie the sum of $3,500 each for the purchase of a home. I do ratify and confirm the same and make these payments a charge upon my estate and do authorize and direct my executor therein named to pay out the sum so mentioned."

The contest over the construction of this will and

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codicil arises between the heirs of Thomas B. Vreeland, among whom is the plaintiff, and the persons named in the 9th clause of his will, above quoted, who claim to be residuary legatees and devisees. It is urged on behalf of the former that the will and codicil of Thomas V. Vreeland disposed only of his personal property, and did not operate to devise his interest in the real property of his brother Conrad which was not validly disposed of by the latter's will. The defendants Zabriskie and Lydia L. Vreeland claim that the will disposed of Thomas Vreeland's entire estate, real and personal, and that they are therefore entitled to his share in the property in question. The heirs rely mainly on the proposition that a devise of real property, particularly after-acquired real property, will not be raised by implication to the disherison of the heir. *Jackson* v. *Burr,* 9 Johns. 104; *Havens* v. *Havens,* 1 Sandf. Ch. 324; *Lynes* v. *Townsend,* 33 N. Y. 558; *Quinn* v. *Hardenbrook,* 54 id. 83; *Brown* v. *Quintard,* 177 id. 75. See, also, *Kerr* v. *Dougherty,* 79 N. Y. 327, 345–347; *Dreyer* v. *Reisman,* 202 id. 476. The residuary legatees rely mainly on the presumption that a testator is to be deemed to have intended, in the absence of controlling expressions to the contrary, to dispose of his entire estate, and the rule that a residuary clause is to be construed, if possible, to cover the entire estate of the testator, real and personal, not otherwise disposed of. *Floyd* v. *Carow,* 88 N. Y. 560; *Lamb* v. *Lamb,* 131 id. 227; *Carter* v. *Board of Education,* 144 id. 621; *Morton* v. *Woodbury,* 153 id. 243. As I read the will of Thomas B. Vreeland, it seems evident to me that he intended to dispose of his entire estate. I assume that at the time he made his will he had no real property other than his burial plot. His interest in the real property of Conrad, situated in New York, was subsequently acquired. But when the codicil was made

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such interest was then vested in him, and it is not improbable that he knew that his brother's right to give his New York real estate to the North New Jersey Baptist Association was questioned, for the codicil was executed only about three months prior to the commencement of this action. In the codicil he uses significant language to the effect that he makes the payments for Russell and Ernest Zabriskie "a charge upon my estate." For what purpose would he have made a codicil using this language but for the purpose of making these legacies a charge on real property, if any he should have? Reading the will and codicil together, and regarding the former as republished as of the date of the latter, I think we may say that Thomas Vreeland intended to dispose of his entire estate, and intended his residuary estate, whether real or personal, to go to the persons named in the 9th clause of his will, and, further, that he used language sufficient to effectuate that intention. It is urged on the part of the heirs of Thomas Vreeland that the will cannot be regarded as republished by the codicil as of the date of the latter, so as to pass real property acquired between the dates of the two instruments, because the codicil, in its dispositive part, is applicable solely and expressly to the property disposed of by the will, and it is asserted that this doctrine is supported by authority, citing 40 Cyc. 1222, n. 47. The authorities mentioned in the citation which might seem to support such a doctrine are English cases, the doctrine of which does not seem to have been accepted by the courts in New York. *Mooers* v. *White,* 6 Johns. Ch. 360, 374, 375; *Van Cortlandt* v. *Kip,* 1 Hill, 590; *Kip* v. *Van Cortlandt,* 7 id. 346; *Howland* v. *Union Theological Seminary,* 5 N. Y. 193, 214; *Brown* v. *Clark,* 77 id. 369; *Matter of Campbell,* 170 id. 84. In *Van Cortlandt* v. *Kip, supra,* Mr. Justice Cowen said: "It

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seems to me that at this day it would be a violation of all reliable authority, to deny that a codicil duly attested to pass real estate, would, *per se,* whether it relate to real or personal property, operate as a republication of a devise, unless the testator declare that he does not intend the codicil to have that effect." And he quotes from Lord Ellenborough in *Goodtitle* v. *Meredith,* 2 Maule & S. 5, 13, as follows: "The effect of all these decisions is, to give an effect to the codicil *per se* and independently of any intention, so as to bring down the will to the date of the codicil, making the will speak as of that date, unless indeed a contrary intention be shown, in which case it will repel that effect." Although *Van Cortlandt* v. *Kip, supra,* was reversed on appeal to the Court of Errors (*Kip* v. *Van Cortlandt, supra*), the doctrine there stated was approved by the latter court, and the decision of the Supreme Court has been since regarded as authority therefor. See *Brown* v. *Clark,* 77 N. Y. 375; *Matter of Campbell,* 170 id. 86. These cases also show that the narrow and highly technical construction resorted to in some of the English cases to spell out an intention to limit the effect of the codicil would not find favor in our courts. I reach the conclusion, therefore, that the interest of Thomas B. Vreeland in the premises in question passed by his will to the persons named in the residuary clause.

I think that Carrie M. Vreeland, widow of Conrad, accepted the provisions of his will in her favor in lieu of dower. In fact, this contention on the part of the plaintiff does not appear to be contested.

Let the plaintiff prepare findings and interlocutory judgment in accordance with these conclusions and notice them for settlement on or before November 19, 1917. Requests to find may be presented at the same time. On the settlement of the interlocu-

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tory judgment I will determine whether the defendant Hoag should be required to give a bond. I know of no authority for such requirement. If there be any such authority, let plaintiff submit the same.

Ordered accordingly.

THE PEOPLE ex rel. THE ARGUS COMPANY, Relator, *v.* FRANCIS M. HUGO, as Secretary of State, et al., Composing the STATE PRINTING BOARD, and J. B. LYON COMPANY, Defendants.

(Supreme Court, Albany Special Term, November, 1917.)

Contracts — awarding of, for legislative printing — state printing board — certiorari.

The act of an administrative or ministerial officer does not become judicial simply because it is necessary to use discretion and judgment in its performance. It becomes judicial only where there is an opportunity to be heard and a decision made upon consideration of the evidence presented.

In the matter of awarding a contract for legislative printing some of the acts of the state printing board in investigating and tabulating the bids, of investigating the financial responsibility of the bidder and its ability to perform the contract and of determining the letting, are certainly matters involving the exercise of judgment and discretion, yet where the action of the board in awarding the contract is not accompanied by any of the forms of judicial action, its determination is not reviewable on certiorari.

CERTIORARI to review the action of the state printing board in awarding the contract for legislative printing.

Neile F. Towner, for petitioner.

Merton E. Lewis, Attorney-General (Sanford W. Smith, First Deputy Attorney-General, Edward G. Griffin, Deputy Attorney-General, of counsel), for State.

F. M. Danaher, for J. B. Lyon Company.

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HASBROUCK, J. The contract for legislative printing was awarded September 21, 1917, by the state printing board to the J. B. Lyon Company of Albany. The Argus Company was the lowest bidder. It has secured a writ of certiorari to review the action of the state board in awarding the contract. The attorney-general has made a motion to quash the writ. Regarding only the petition for the writ the sole question raised is whether the function of the state board in letting the contract is administrative or judicial. If administrative in character the writ should be dismissed; if judicial it should be sustained. The writ has heretofore been used for the very purpose of reviewing the determination of the state printing board under law not differing in substance from the present. *People ex rel. Lyon Co.* v. *McDonough,* 173 N. Y. 181; *People ex rel. Williams* v. *McDonough,* 85 App. Div. 162. But in neither of the above cases was the remedy called in question. The effort of the bench is to attain and dispatch justice and if parties fail to object to the clothes the suitor wears it would serve no useful purpose and not be commendable to the freedom of the forum for it to do so.

There is no cause for wonder that in those cases no challenge of the remedy was made. It had been decided by the court of last resort that the letting of a contract upon rival bids was judicial in its nature. Judge Cullen, speaking of the letting of a contract by a common council of a city, said: "In this class of cases the term 'judicial' is not used in the sense of appertaining to the judiciary or the administration of justice, but as indicating the exercise of discretion or judgment as distinguished from what is purely ministerial." *Gleason* v. *Peerless Manufacturing Co.,* 1 App. Div. 257; 163 N. Y. 574.

Judge Danforth, on the same subject, a contract for

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lighting streets, wrote: "It was the duty of the defendants to choose between these illuminating substances; to determine the responsibility of the bidders, the sufficiency of the security offered, the greater or less economy and desirableness of the several means of lighting, and this could only be done after comparing the bids and the advantages of the methods proposed. As to all these things there must first be investigation and inquiry, then discretion, and afterward determination or judgment." *East River Gas-Light Co.* v. *Donnelly,* 93 N. Y. 557.

The Gas-Light Company case was decided in 1883. The Court of Appeals of 1890 in the case of a contract for cleaning streets distinguished the *Gas-Light Company* case. They held the contract letting was not judicial if the act of letting was arbitrary. *People ex rel. Coughlin* v. *Gleason,* 121 N. Y. 631.

In 1892 the court still held the doctrine sound that where there was an examination of proposals and an award the act was "judicial in its nature and character." *Erving* v. *Mayor,* 131 N. Y. 139.

Ten years afterwards over the letting of a contract for curbing and paving there was an apparent change in the view of the court regarding the character of the act of letting a contract and it held: "We are, however, of the opinion that the proceedings sought to be reviewed are neither judicial nor quasi judicial, and, therefore, under the well settled rules are not subject to review by certiorari." *People ex rel. North* v. *Featherstonhaugh,* 172 N. Y. 128.

The *Featherstonhaugh* case has been quoted with approval in *Matter of Standard Bitulithic Company* where the act sought to be reviewed was the cancellation of a contract. 212 N. Y. 182. It is not apparent that there is much difference between the qualities of the acts of making and unmaking a con-

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tract. See, too, *People ex rel. Hayes* v. *Waldo*, 212 N. Y. 171.

It may be said besides that the exercise of the function of letting the state printing contract is not accompanied by any of the forms of judicial action. In this fact we may find the reason for the apparent divergence of views between the earlier judges and those constituting the court at present. Judge Collin, writing for the Court of Appeals, said of the action of the state canal board in attempting to revoke a resolution approving of work done under a contract: "An adjudication involves the exercise of judicial power through a hearing upon an issue, the receiving and weighing of evidence and the act of rendering a judgment. The assent to the change was an administrative, not a judicial act." *People ex rel. Graves* v. *Sohmer*, 207 N. Y. 455.

In the *Bitulithic* case the court along the same line says: "There is nothing in the Highway Law directing the commissioner of highways in a proceeding such as the one herein considered to take testimony or give the parties interested an opportunity to be heard. A trial in any judicial sense is not contemplated. The sole question requiring consideration on this appeal is, whether the act of the defendant in canceling the contract was a judicial act in nature and character. We think it was not."

The acts of investigating the bids and tabulating them, of investigating the financial responsibility of the bidder and his ability to perform the contract and of determining the letting are some of them certainly matters involving the exercise of judgment and discretion. Yet, in the case at bar there has been no hearing, no trial, no production of evidence and no determination after a hearing. The act of an administrative or ministerial officer does not become judicial

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simply because it is necessary to use discretion and judgment in its performance. It becomes judicial only when there is opportunity to be heard, evidence presented and a weighing of the evidence and a decision thereon. If this view be correct then the award of the state printing contract to the J. B. Lyon Company was not a judicial act and certiorari is not the proper remedy. Because of the uncertainty in which apparently conflicting decisions have left the relator, no costs are allowed.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. EDWARD NALLY, Relator, *v.* HERBERT S. SISSON, State Commissioner of Excise, and JOHN P. MCNAB, Special Deputy Commissioner of Excise for the County of Albany, N. Y., Defendants.

(Supreme Court, Albany Special Term, November, 1917.)

Liquor Tax Law — commissioners appointed to investigate places where traffic in liquor may be continued — statutes — Laws of 1917, chap. 623.

Chapter 623 of the Laws of 1917 which directs the three commissioners appointed by the mayor of a city to investigate as to the location of places within the city where trafficking in liquor was engaged in and to determine before September 1, 1917, the places within the municipality where such traffic may continue during the year beginning October 1, 1917, requires the commissioners to act as a board, and where due notice of the time and place of meeting is given to each commissioner, one of whom did not attend, the written statement, containing a description of the places where the traffic in liquor may be continued, as required by the statute, and signed by the other two commissioners, is a compliance therewith.

APPLICATION for a writ of certiorari.

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Albert J. Danaher (Wm. J. Roche, of counsel), for relator.

Harry D. Sanders, for defendants.

CHESTER, J. The relator, Edward Nally, was the holder of a liquor tax certificate duly issued pursuant to law, which authorized him to traffic in liquors at No. 1301 Seventh avenue, in the city of Watervliet, during the year beginning October 1, 1916, which certificate was in full force at the time of the taking effect of chapter 623 of the Laws of 1917, which chapter made numerous amendments to section 8 of the Liquor Tax Law. Laws of 1909, chap. 39. These amendments provided among other things for a substantial reduction in the number of places where liquor might be sold under certificates like that held by the petitioner, so that in the city of Watervliet it was necessary to reduce the number from forty-seven to twenty-nine. Pursuant to the provisions of the amendatory act, in order to effectuate the reduction, the mayor of the city appointed three commissioners whose duty it was to investigate as to the location of places within such city where traffic in liquors was engaged in and to determine before September 1, 1917, the places within the city where traffic in liquors might continue during the year beginning October 1, 1917. The statute provides that within ten days after notification of their appointment the members of the commission shall meet at a time and place to be designated by the commissioner of excise and shall organize by the election of one member as chairman of the commission and also provides that the commission may appoint a clerk. The commission so appointed did meet and organize in the manner provided by statute. The amended statute also provides that: "The said commission shall

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prepare a written statement containing a description of the places where such trafficking in liquors may be continued, giving the street number, if any, and the names of the holders of the liquor tax certificates under which such trafficking was engaged in at the time of the investigation. * * * Such statement shall be signed in triplicate by the members of the commission, one of which triplicates shall be filed with the state commissioner of excise, one with the certificate issuing officer of the county in which such city or town is situated, and one in the office of the clerk of the city or of the town clerk of the town." The statute also provides that: "The determination of such commission shall be final and conclusive. In case such commission shall fail to designate on or before September first, nineteen hundred and seventeen, the places in such city or town for which liquor tax certificates may be issued, or in case the mayor of a city or the town board of a town refuses or fails to appoint such commissioners, or if for any other cause such designation is not made, the state commissioner of excise shall designate said places."

It appears that the determination of such commission was made at a meeting thereof held at the city hall in Watervliet, where it had been accustomed to meet, and upon notice duly given of the time and place of said meeting to the third member of the commission who did not attend; that two members of said commission who did attend prepared their statement in triplicate designating the relator's place as one of the places where such trafficking might be continued and filed such statement in the offices required by the statute and that the third member of the commission also prepared and filed a statement in writing in triplicate designating some other places but including in his designation also the name of the relator and the description of his place.

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The state commissioner of excise insists that the three commissioners must all join in signing the statement and that a statement signed by two only is not a compliance with the law. Regarding the certificate signed by the two commissioners as a failure to designate in this case, he has made an investigation on his own account and has designated the places where trafficking in liquors in Watervliet might be continued, omitting in his designation the name and the place of the relator.

So the question is clearly presented here as to whether the statement required by law must be a single statement signed by all three of the commissioners or whether it may be the statement of a majority of them acting as a commission.

The state commissioner of excise places his contention largely upon the provision in the law that "Such statement shall be signed in triplicate by the members of the commission," but in construing statutes the entire law must be taken into consideration so that if possible all parts of it may be made effective. It cannot be overlooked here that, as above mentioned, the mayor under the law is to appoint a "commission" to consist of three members; that such "commission" is required to meet and organize by the election of one member as chairman and authority is given to the "commission" to appoint a clerk. The "commission" is required to investigate as to the location of places within the city where trafficking in liquors is engaged in under the liquor tax certificates and to inquire as to the conduct of such business at such places. Upon the completion of such investigation and inquiry the law provides "that the said *commission* shall *determine* as to the places * * * where trafficking in liquors may be continued during the ensuing year;" that the "*commission*" shall prepare a

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written statement containing a description of such places and that the determination of such "commission" shall be final and conclusive.

It is thus clear under the express terms of the statute itself that it is the *commission* which is required to act and that it acts as a board or a body.

The fact that the law makes it the duty of the individual members in certifying the action of the commission to sign the statement which it is required to make in nowise changes the character of the duties which devolve on that body, nor can the failure of an individual commissioner to perform the duty thus imposed upon him to sign the statement representing the official act of the commission be permitted to nullify the clear purpose and intent of the law.

There is force in the suggestion that in this case the statement signed by the two commissioners and the separate statement signed by the third commissioner, both of which included the name of the relator and a description of his place, should be regarded, so far as he is concerned, as a single statement signed by all three of the commissioners, and therefore effective as a determination in his favor.

But I prefer to put my decision on the ground that the act requires the commissioners to act as a board and that therefore a majority vote at a meeting duly called of which all the members had notice is sufficient.

Indeed it has recently been held by Justice Morschauser at Special Term, in a recent case arising under this amendment, that where a statement is signed by two of three commissioners, with a minority report signed by the third commissioner, the state commissioner of excise had no authority to make the designation and that the designation by a *majority* of the commissioners was a designation by the commission. *People ex rel. Max Glick* v. *Russell, Co. Treas.*,

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Dutchess Spec. Term, not yet reported. In determining this question I should follow this decision. It is not only in harmony with section 41 of the General Construction Law as applied to situations like that presented here (Laws of 1909, chap. 27), but with the rule of the common law. 23 Am. & Eng. Ency. of Law, 59; 29 Cyc. 1689; *People ex rel. Washington* v. *Nichols*, 52 N. Y. 478.

The ruling also gives force to the evident intention of the legislature in these amendments to the Excise Law to give to each locality, in the first instance, through its local commissions, the right to make the required investigations and to determine the places where trafficking in liquors might be carried on, as well as those which their investigation lead them to believe should not be permitted to so traffic, in order to reduce the places to the number authorized by law. This in effect was held in the *Glick Case, supra*, and also in *Matter of Hickey*, 101 Misc. Rep. 323.

Application granted.

EVANETTA HARE, Respondent, *v.* NEW YORK TELEPHONE COMPANY, Appellant.*

(County Court, Rensselaer County, April, 1917.)

Telephone companies — contracts — provisions of — when customer not entitled to restoration of service.

A provision of a contract for a telephone service that the rate specified is payable in advance in equal monthly installments remains in force if the service is continued beyond the term of the contract.

Where a contract is "for a term beginning with the establishment of service and ending one year from the first day of

* Judgment unanimously affirmed by the Appellate Division, Third Department, November 17, 1917.—[REPR.

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the following month and thereafter until terminated by ten days' notice in writing by either party to the other," and upon nonpayment of the monthly rental in advance the telephone company discontinues its service and removes its apparatus, the customer is not entitled to a restoration of the service unless a new contract is made.

APPEAL from a judgment of the City Court of Troy, rendered in favor of plaintiff.

John A. Delehanty, for New York Telephone Company, appellant.

James Farrell, for Evanetta Hare, respondent.

RUSSELL, J. This is an appeal from a judgment entered in the above entitled action in the City Court of Troy, N. Y., on the 15th day of January, 1917, against the defendant for the sum of $150 and costs.

This action was brought for the recovery of damages from the defendant for failing to furnish telephone service to the plaintiff and for removing its telephone apparatus from the residence of the plaintiff.

On July 26, 1916, the defendant, claiming that there was due to it from the plaintiff the sum of two dollars for rent and thirty-six cents for tolls, discontinued the telephone service from the plaintiff's residence. On or about August 15, 1916, the defendant removed its telephone apparatus from the residence of the plaintiff, although the plaintiff offered to pay the sum of one dollar and seventy-one cents on account of the amount due for telephone rental from July 1, 1916, to July 26, 1916, besides thirty-six cents for tolls on or about August 7, 1916. The plaintiff refused to sign a new contract for the restoration of the service, claiming that she had not broken the contract and wanted no other contract.

The contract in part reads as follows: "The subscriber hereby requests the New York Telephone Com-

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pany to furnish at her residence, 29 Eighth street, Troy, N. Y., the telephone facilities and amount of local service in connection therewith described in 'A' on the reverse thereof, for a term beginning with the establishment of service and ending one year from the first day of the following month, and thereafter until terminated by ten days' notice in writing by either party to the other * * *."

Under terms and conditions No. 1, the contract reads as follows: "During the term beginning with the establishment of service and ending one year from the 1st day of the following month (a) for the telephone facilities and service specified in 'A' on the reverse hereof at the rates specified thereunder payable in equal installments monthly in advance and *pro rata* for any fractional service * * *."

In construing this contract and in arriving at the intent and understanding of the parties thereto, it is essential to construe the contract as a whole. It is a contract entered into between the telephone company and many thousands of people. The company has exercised its power to print terms of the contract and this printed contract has been accepted generally by the people who use the service of its telephone. It is generally understood by all parties to this contract to continue the terms under which the telephone was installed. To say that after the first year's service had expired, and the continuance of the service was enjoyed without any different terms being entered into, that the parties were then bound by different terms and that the telephone company must resort to proceedings in court in each and every instance where a party had changed his mind, would be obstructive law.

After the expiration of the first year's service the plaintiff evidently continued payment in advance as appears by the evidence. The evidence of the plain-

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tiff was in part as follows: "Q. Did you pay monthly rental for the month of June? A. Yes, sir. Q. 1916? A. Yes, sir. Q. During what month? A. June, of course. Q. For the month of May did you pay that? A. Yes. Q. During what month? A. May, I presume. Q. Don't you know? A. Yes, I am quite certain it was May. Q. How about April, 1916? A. I think I have always paid my bills during the month they were due. Q. During the month they were due, meaning in advance, before the month expired? A. Yes."

It would seem by the foregoing evidence what the plaintiff understood to be the terms of the contract.

It seems to me that the proper construction to give to this contract with respect to the period of time in which the rate specified is payable in equal installments monthly in advance is embraced within the words "for the term beginning with establishment of service and ending one year from the first day of the following month and thereafter until terminated by ten days' notice in writing by either party to the other."

To exact payment in advance is only a reasonable exercise of the power vested within the province of the company. *Southwestern Tel. Co.* v. *Danaher,* 238 U. S. 482.

Mr. Justice Van Devanter, in delivering his opinion in this case, said: "It also was strongly supported in reason, for not only are telephone rates fixed and regulated in the expectation that they will be paid, but the company's ability properly to serve the public largely depends upon their prompt payment. They usually are only a few dollars per month and the expense incident to collecting them by legal process would be almost prohibitive. It uniformly is held that a regulation requiring payment in advance, or a fair deposit to secure payment, is reasonable, and this is recognized in the brief for the plaintiff where it is said

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that to protect themselves against loss telephone companies 'can demand payment in advance.'"

But even if we assume that the written contract which provided that the payment of the rate specified should be made in equal installments monthly in advance was in force only for the term of one year, nevertheless I am of the opinion if the telephone service was continued longer than a year, and if there was no cessation of service at the end of the year, that the parties continued under an implied contract, the terms of which were based upon and understood to be by the parties the same as those of the written contract. It is only reasonable to say that inasmuch as the relations of both parties continued in all respects exactly as if the first year had not expired, that the continuance of service and use of the service were merely an enlargement of the term. *Adams* v. *Fitzpatrick,* 125 N. Y. 124; *Baylies* v. *Ingram,* 84 App. Div. 360; *Wallace* v. *Devlin,* 36 Hun, 275.

Having decided this point it naturally follows that the telephone company had the right to discontinue its service from plaintiff's residence and also remove its telephone apparatus provided the plaintiff would not sign a new contract. When the plaintiff did not pay the monthly rental in advance for the service, the plaintiff broke the contract. The defendant then had the right to discontinue its service and recover upon a *quantum meruit* for the services rendered the plaintiff.

See order of Mr. Justice Howard, not yet reported, denying a motion for an order enjoining and restraining the defendant from continuing to violate its contract and requiring the defendant to furnish telephone service at her residence in accordance with the terms of said contract.

Judgment reversed.

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Matter of the Judicial Settlement of the Account of FRANK V. KELLY, Public Administrator of Kings County, as Administrator of the Goods, Chattels and Credits Which Were of JOHANNA BANG, Deceased.

(Surrogate's Court, Kings County, November, 1917.)

Executors and administrators — judicial settlement of accounts of public administrator — alien enemies.

Upon the judicial settlement of the accounts of a public administrator, it will be decreed that payments due to subjects of Germany or any of its allies from the funds to be distributed shall be made either at the end of the war to the alien himself, or, in the meantime, to the duly constituted authority of the United States entitled to receive the same.

PROCEEDING upon the judicial settlement of the account of the public administrator of Kings county.

Adam Christmann, Jr., for John H. Scheidt, attorney-in-fact for Henni Helene Henrika Wundram and Wilhelmine Auguste Friedericke Bang.

Merton E. Lewis, attorney-general (Charles J. Masone, of counsel), for State of New York.

Edward J. Byrne, for public administrator.

KETCHAM, S. The fund remaining in the hands of the public administrator for distribution belongs to subjects of the empire of Germany.

It is the obvious duty of the accountant not to pay this fund to the persons who in times of peace would be entitled to the same. The right of the United States during the existence of the present war to appropriate

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any property of an alien enemy is a continuing right, and it imposes upon persons having control or possession of such property the duty of withholding the same from the enemy in order that the property at all times may be immediately available to the government if it shall assert a right to its possession.

It is necessary that between enemies in arms laws so far only as they affect private rights shall hold their peace, but these rights are not to be extinguished. Subject to the just demands of the government, they remain in force but suspended.

Hence it is the duty of this court to make its decree in recognition of the obligation of an accounting party to legatees or distributees, though aliens, but it has the higher duty to see that the republic takes no harm from such decree. This was the law before the enactment of the Trading with the Enemy Act,* the provisions of which only confirm the law of nations in that regard and define the methods by which it may be made operative.

In this case, as in others of like character, this court will decree that payments due to the subjects of Germany, or of any of its allies, shall be made either at the end of the war to the alien himself or, in the meantime, to the duly constituted authority of the United States entitled to receive the same.

Decreed accordingly.

* See Act of Congress, October 6, 1917.— [REPR.

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PUBLIC SERVICE COMMISSION, SECOND DISTRICT, Petitioner, *v.* MOUNT VERNON TAXICAB COMPANY, Defendant.

(Supreme Court, Rockland Special Term, November, 1917.)

Carriers — of passengers — injunctions — automobiles — consent of local authorities — Laws of 1915, chap. 667, § 26 — public service commission — Transportation Corporations Law, § 25.

The operation of defendant's auto bus line between the city of Mount Vernon and Rye Beach is in competition with another common carrier, and without the consent of the local authorities of the cities of Mount Vernon and New Rochelle as provided by section 26 of chapter 667 of the Laws of 1915, and a certificate of public convenience and necessity from the public service commission as required by section 25 of the Transportation Corporations Law, such operation is unlawful and will be enjoined.

SUMMARY proceeding under section 57, Public Service Commissions Law.

Defendant, a domestic corporation, applied to the common council of Mount Vernon for consent to the operation of motor vehicles on the streets of that city, as provided by section 26 of chapter 667 of the Laws of 1915, and received the consent of that city. It made a like application to the common council of the city of New Rochelle, which did not grant its consent. Defendant, without making any application to the public service commission, as required by section 25 of the Transportation Corporations Law, commenced to operate an auto bus between Fifth Avenue bridge in Mount Vernon and Rye Beach, over the streets of Mount Vernon and New Rochelle for about seven miles and over a town highway for about four miles, for a fare of thirty-five cents in either direction. This proceeding was prosecuted for the purpose of enjoining such operation.

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Ledyard P. Hale, for petitioner.

Jeremiah D. Toomey, for defendant.

TOMPKINS, J. Counsel for the defendant urged me to read their brief through, and to do it carefully. That I have done, and have given much thought to the case and to every phase of it, and have reached the conclusion that the operation of the defendant's bus service between Mount Vernon and Rye Beach is in competition with another common carrier, and therefore without the consent of the local authorities of the cities of Mount Vernon and New Rochelle and a certificate of public convenience and necessity from the public service commission is unlawful.

The operation of the busses carrying about twenty people each on a regular line or route is altogether different than an ordinary taxicab service where vehicles are operated upon no regular route but take patrons anywhere they choose to go. I think the defendant's bus line from New Rochelle and then on to Rye Beach is such a line as the statute contemplates can only do business with the consent of the local authorities and the public service commission.

The petitioner's application will, therefore, be granted, but without costs save taxable disbursements.

Application granted.

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SAMUEL SCHEIN, Appellant, v. THE PUBLIC BANK OF NEW YORK CITY, Respondent.

(Appellate Term, First Department, November, 1917.)

Banks — mistake of, in failing to honor depositor's check — damages — trial.

Where a bank through its own mistake fails to honor a depositor's check at a time when he had sufficient funds to meet it, and thereafter he is refused credit by the party from whom he bought goods in payment of which the check was given, he is, in an action against the bank, entitled to have the question of damages sent to the jury.

APPEAL by plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, second district, dismissing the complaint after a trial by a judge and jury.

Grauer & Rathkopf (Charles A. Rathkopf, of counsel), for appellant.

Stroock & Stroock (Charles Levy, of counsel), for respondent.

BIJUR, J. Plaintiff sued defendant for damages for failure to honor his check at a time when he had sufficient funds in defendant bank to meet the same. The failure of the bank to honor the check was due to its own mistake.

Plaintiff proved clearly that he was subsequently refused credit (because of this dishonoring of his check) by the party from whom he had bought the goods in payment of which the check was given. He was, therefore, entitled to have submitted to the jury

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the question of the amount of damage which he had suffered. *Levine* v. *State Bank*, 80 Misc. Rep. 524.

PHILBIN and ORDWAY, JJ., concur.

Judgment reversed and a new trial granted, with thirty dollars costs to appellant to abide event.

JAMES S. HOPKINS, as Receiver, etc., Respondent, *v.* MOSS BLOSVEREN et al., Appellants.

(Appellate Term, First Department, November, 1917.)

Depositions — examination before trial — witness — motions and orders — Municipal Court Code, § 27(4).

Section 27(4) of the Municipal Court Code does not authorize an order for the examination of defendants' attorney as a witness before trial and an order denying a motion to vacate such an order will be reversed, the motion granted and the order vacated.

APPEAL by defendants from an order of the Municipal Court of the city of New York, borough of Manhattan, first district, directing the examination of defendants' attorney as a witness before trial, and from an order denying a motion to vacate the order of examination.

Edgar Weaver, for appellants.

Walter E. Godfrey (Ralph Guttchen, of counsel), for respondent.

BIJUR, J. It is conceded by respondent that the only authority for such an order must be found in Municipal Court Code, section 27, subdivision 4, read-

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ing as follows: "The deposition of a party to an action in this court or of a person who expects to be a party to an action about to be brought in this court may be taken at his own instance or at the instance of an adverse party, or by a co-plaintiff or co-defendant at any time before or during the trial, in the same manner as such depositions are taken under the provisions of law applicable to like cases in the supreme court."

Order denying motion to vacate order of examination reversed, with ten dollars costs, motion granted, with ten dollars costs, and order of examination vacated; appeal from order of examination dismissed.

PHILBIN and ORDWAY, JJ., concur.

Order reversed, with costs. Appeal dismissed.

THE HOSTETTER COMPANY, Appellant, *v.* JOHN MCGOWAN, Respondent.

(Appellate Term, First Department, November, 1917.)

Penalties — action to recover — trial — statutes — labels — evidence — General Business Law, § 367.

Section 367 of the General Business Law is offended if one sells from a receptacle that has been refilled even with the same liquid manufactured by the manufacturer of the original contents of the receptacle.

Where in an action to recover a penalty under the statute plaintiff makes proof that defendant sold, kept and offered for sale from a bottle bearing plaintiff's label, "Hostetter's Bitters," an article or substance other than the original contents of said bottle placed therein by plaintiff, it is error to dismiss the complaint as well as to refuse to allow a witness to identify the liquid sold to him.

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APPEAL by plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, rendered in favor of defendant.

Theodore E. Larson, for appellant.

William J. Sheils (Joseph D. Kelly, of counsel), for respondent.

PHILBIN, J. The action is brought under section 367 of the General Business Law for recovery of two penalties of $100 each. The statute contains a provision, by which, in brief, any person or corporation engaged in manufacturing, bottling or selling any article of merchandise put up for sale in any bottle with a trade-mark, label or private mark appearing thereon, may file a *facsimile* of the latter with the secretary of state, and he thereupon becomes the proprietor thereof. It is also provided as follows: "No person, other than such proprietor * * * shall sell, keep or offer for sale in, from, or out of, or fill, place or put into, any * * * bottle or receptacle on which any such names, labels or marks in any manner appear, and while * * * labeled * * * or marked, any article or substance other than the original contents placed therein by the proprietor of the label, trade-mark or other private marks thereon * * *. Each act of refilling, each sale * * * and each offering for sale shall be construed as constituting a separate and distinct violation of this act. Any person violating any provision of this section shall forfeit to such proprietor one hundred dollars for each such violation."

The complaint alleges the registration of its trademark and label in compliance with the statute; that the defendant was engaged in the business of selling

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liquors at a certain saloon owned, conducted and controlled by him; and that on the 16th of April and 1st of May, 1917, defendant sold, kept and offered for sale from a bottle bearing plaintiff's label an article or substance other than the original contents of said bottle placed therein by plaintiff. Each alleged occasion is set up as a separate cause of action. The answer is a general denial, except that the allegations as to defendant owning and conducting the saloon are not denied. The article produced and so labelled was a stomach bitters known as Hostetter's Bitters.

On the trial the defendant put in no evidence, and the court dismissed the complaint at the close of plaintiff's case.

The testimony of three witnesses for the plaintiff showed that under the instructions of the latter they visited the saloon in question for the purpose of ascertaining if the statute was being violated in relation to plaintiff's goods. They were sold the bitters by defendant's bartender on each occasion. One of the witnesses, unknown to the bartender, placed a secret mark on the bottle on the first visit, for the double purpose of identifying it and indicating the extent to which the contents had been used. The subsequent visits to the saloon showed the bottle had been partly refilled. The witness Turner, who had about ten years' experience with plaintiff as an investigator and knew the taste of the bitters, was asked if the liquor thus sold to him was the bitters, but an objection to the question by defendant that it called for a conclusion was sustained. We think this was error, as the witness was not called upon to express merely an opinion. There is no reason why a person cannot just as positively make an identification by the sense of taste as by any other sense. The respondent claims that there was no evidence connecting the defendant with any of

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the sales. The sales by the bartender were made in the prosecution of the defendant's business, and the plaintiff has a right to hold him responsible therefor. *People* v. *D'Antonio*, 150 App. Div. 109. It is further said that the complaint was rightly dismissed because the plaintiff failed to prove the original contents of the bottle. It is immaterial what the original contents were. It must be evident that the plain intent of the statute is that the bottle once filled by the manufacturer shall not be filled again by any one else. The reason for this is apparent. The label of the manufacturer is tantamount to a representation of the quality and character of the contents of the bottle, and the standing of the article is affected in value according as the representation is made good. It follows that the manufacturer should have every opportunity to protect his property right by having the article so represented prepared for the market under his own supervision. It is not unlikely that replenishing a half consumed bottle with even the same liquid from another bottle put up by the manufacturer would so affect the flavor as to injure the prestige of the article. The law says you shall not sell a bottle that has been refilled. It does not say that you shall not refill with "any article or substance other than the original contents," *except* an article precisely like the original contents. Consequently, the statute is offended if one sells from a receptacle that has been refilled with even the same liquid manufactured by the manufacturer. The theory that a refilling with the same article would be authorized was pronounced in *People* v. *Luhrs*, 195 N. Y. 377, as plausible, but unsound.

We think the plaintiff made out a *prima facie* case by showing that there was a sale in violation of the statute for which the defendant was responsible and that it was error to dismiss the complaint, as well as

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to refuse to allow the witness to identify the liquid sold to him.

BIJUR and ORDWAY, JJ., concur.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

ROYAL INDEMNITY COMPANY, Respondent, *v.* ISAAC J. DANZIGER, Appellant, LOUIS SCHNEIDER, Defendant.

(Appellate Term, First Department, November, 1917.)

Indemnity — action on bond given to save harmless plaintiff in replevin on its bond — substitution of obligors in contract of indemnity — effect of seal — judgment for plaintiff reversed.

The evidence in an action brought upon an indemnity agreement under seal to save the plaintiff in an action in replevin harmless from loss on its bond given to the defendant in said action two years before the making of the agreement in suit, considered, and *held*, that a judgment in favor of plaintiff must be reversed on the ground that there was no evidence of any consideration for the defendant's agreement though the one on whose behalf the action in replevin was brought testified that he told said defendant that the plaintiff in replevin wanted him to sign the indemnity agreement in order to relieve the original obligor from liability, there being no evidence that the plaintiff in replevin ever authorized any such statement to be made or ever released the original obligor from the indemnity agreement.

That as there was no evidence that defendant herein had authorized any one to seal the indemnity agreement it did not import a consideration and that the plaintiff herein could not treat the seal as surplusage for the purpose of asserting the validity of the contract and at the same time insist upon it as importing a consideration.

APPEAL by the defendant Danziger from a judgment of the Municipal Court of the city of New York, bor-

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ough of Manhattan, first district, in favor of the plaintiff, after a trial by the court without a jury.

Samuel F. Hyman, for appellant.

Frank J. O'Neill (Barnett Cohen, of counsel), for respondent.

ORDWAY, J. This is an action to recover on an indemnity agreement. The facts are substantially as follows: In 1914 an action was brought on behalf of one Baker or Bisgier against the Essanbee Film Company. The action was in replevin and the plaintiff gave its bond to the film company upon the application of Baker. To secure itself from loss on this bond it obtained from one Eisenstein a bond. During the pendency of the replevin action, Eisenstein wished to be released from his bond. He asked Baker to obtain such release. Baker went to the defendant Danziger, his lawyer in the replevin action, and told Danziger that Eisenstein wanted to be relived from his bond, and stated that plaintiff would release him if in addition " to the collateral security which I was willing to put up of $500," Danziger would sign an agreement to hold the plaintiff harmless in the replevin action the same as Eisenstein had done. Danziger was at his home when Baker saw him and Baker had with him and showed Danziger the agreement which he said plaintiff required Danziger to sign in order to release Eisenstein. Danziger said he was ill and would not sign it then, but would be down to his office the next day and would then sign it. The next day Baker went to Danziger's office but he was still at his home. One Hyman, the defendant's present attorney, occupied the office with Danziger. Baker called up Danziger on the

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telephone and Danziger told Hyman to sign his (Danziger's) name to the agreement, and he did so. It is upon this agreement that this action is based. Danziger denied authorizing any one to sign his name to this paper as it now appears in evidence. He claims that Baker said he was settling a case with Eisenstein and that the indemnity company wanted the consent of the attorney to some change in the agreement, and that he told Baker he would telephone his office that a consent to such change should be signed. He did not deny having a conversation with Baker at his house or that he communicated with Hyman over the telephone with reference to signing a paper. Hyman says that he read the paper before he signed Danziger's name to it and knew what it was, but that he never received any authority from Danziger to execute an indemnity agreement as such. This statement as to the paper being a "request" for something was disputed by Baker, who testified that Danziger read the paper and knew all about it.

On these facts the learned trial justice decided in favor of the plaintiff, and we must assume that he believed Baker, since the credibility of the witnesses as to the question of fact involved was clearly for the learned justice to decide. Nevertheless, the judgment must be reversed, as there is no evidence in the case of any consideration for Danziger's agreement. It is true that Baker testifies that he told Danziger that the plaintiff wanted Danziger to sign the indemnity agreement in order to relieve Eisenstein from his indemnity agreement, but there is no evidence whatever that the plaintiff authorized Baker to make any such statement, or that the plaintiff ever released Eisenstein from his indemnity agreement. The respondent claims that even though there is no evidence that Eisenstein was actually released, there was a novation and accept-

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ance by the plaintiff of Danziger in place of Eisenstein, but there is no evidence to that effect in the record. In fact, there is no evidence in the record that the plaintiff had anything to do with the transaction, or knew anything about it, except that it has physically received the agreement in suit (which does not even recite Eisenstein's release), and is now seeking to enforce it, which is not sufficient. *Levin* v. *Dietz*, 194 N. Y. 376. It is true that the agreement does recite a sufficient consideration, namely, the giving of the replevin bond, but it is conceded that the bond was given some two years before the agreement in suit was signed, and no claim is made that the giving of the bond could be the consideration for the agreement in suit.

As the agreement in suit is under seal, it would import a consideration if it appeared that Danziger had duly authorized Hyman to seal the instrument, but there is no such evidence, and it is still the law of this state "that between private parties, authority to execute a contract under seal must be conferred by an instrument under seal." *Peterson* v. *City of New York*, 194 N. Y. 437, 440. It is true, as claimed by the respondent, that the seal in this case is surplusage, and that where an agent, authorized to execute a simple contract only, unnecessarily attaches a seal to the instrument executed by him, which would be good as a simple contract, the seal may be treated as surplusage, and the validity of the contract be in no way affected by it, although the authority was not under seal, but was conferred merely by parol. *Worrall* v. *Munn*, 5 N. Y. 229; *Wood* v. *Wise*, 153 App. Div. 223. But in such cases the principal will not be bound by such an instrument as a sealed instrument. The respondent cannot treat the seal as surplusage for the purpose of asserting the validity of the contract, and

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at the same time insist upon it as importing consideration.

BIJUR and PHILBIN, JJ., concur.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

Matter of the Petition of ETHEL B. WYGANT for an Inspection of the books and Records of the Corporation of BURDICK & SON.

(Supreme Court, Albany Special Term, November, 1917.)

Mandamus — when peremptory writ of, granted — corporations — right of stockholder to inspect books.

The common law right of a stockholder to inspect the books of his corporation in a proper way, at a proper time and place and for a proper purpose, has not been affected by legislation, and upon an application made in good faith the court in its discretion, for good cause shown, may enforce the right by a peremptory writ of mandamus.

Where upon the application of the one woman stockholder of a domestic manufacturing corporation, owned and controlled by the members of one family, who does not have the opportunity or the permission or capacity to learn of the affairs of the company to the same degree as all of the other stockholders, it appears that she is entirely ignorant of the condition of the business, that no dividend has ever been received by her upon the shares of stock of which she is the owner and holder, and that she has no way of obtaining knowledge of the value thereof unless aided by legal process, she will be granted a peremptory writ of mandamus commanding the officers and directors of the corporation to exhibit to her and to her attorney and to a certified public accountant all books of accounts, records and papers of the corporation, with permission to fully examine the same and to take extracts therefrom.

APPLICATION for a peremptory writ of mandamus.

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A. Page Smith, for petitioner.

Louis F. O'Neill, for Burdick & Son and Bainbridge W. Burdick, president and treasurer, respondents.

RUDD, J. The petition of Ethel B. Wygant asks for an order directing a writ of peremptory mandamus directed to the corporation of Burdick & Son, Bainbridge W. Burdick, president and treasurer, and to its officers and directors, commanding them to exhibit to the petitioner and her attorneys and accountant, or other necessary assistant, all books of account, records and papers of the corporation covering the period from May 14, 1908, to date and permitting the petitioner and her assistants to fully examine the same and to take extracts therefrom.

The petitioner is a stockholder in the corporation of Burdick & Son and has been since the year 1909, holding 302 shares of its capital stock of the par value of $100 each.

The capital stock of the corporation consists of 2,000 shares.

The petitioner received, under the will of her father, who was formerly president of this corporation, 250 shares of the 302 shares of which she is now the owner and holder.

The number of shares held by each stockholder is as follows: Bainbridge W. Burdick, 1,010; Ralph V. Burdick, 500; R. Wallace McKee, 182; estate of Andrew W. Hahn, 6; petitioner, Ethel B. Wygant, 302.

The corporation of Burdick & Son has been engaged in the business of manufacturing certain metal specialties and articles since the year 1905. The company has in its employ 350 or 400 hands. The business of the company has been large for several years.

R. Wallace McKee is vice-president and manager of

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the concern, and Bainbridge W. Burdick is the president and treasurer. They are the directors of the company and are its officers and have been since 1908. The petitioner has never been a director or officer of the corporation.

The petitioner, as one of the stockholders of the corporation, made, on March 30, 1917, a personal request and also a written demand of Bainbridge W. Burdick, president and treasurer of the company, for permission to examine, with the aid of an accountant and an attorney, the books of accounts, vouchers, records and stock books of the concern.

A written instrument, which is a part of the petition herein, was presented by A. Page Smith, attorney for the petitioner, to Bainbridge W. Burdick asking permission, on behalf of the petitioner, and for her accountant and attorney, to examine the books and records. This request was refused peremptorily. Bainbridge W. Burdick tore the written instrument, setting forth the request of the petitioner, into pieces and stated that he refused such request.

The petitioner avers that she is entirely ignorant of the condition of the business, that no dividend has ever been received by her upon the shares of stock of which she is the owner and holder, that she has no way of obtaining knowledge as to the value of the property represented by her holdings unless she is aided by the process of the court.

Petitioner is a sister of Bainbridge W. Burdick, and their father was the owner, at the time of his death May 14, 1908, of 750 shares of the capital stock of this corporation and was president thereof.

The petitioner avers that there has not been a meeting of the stockholders of the corporation since the death of her father, and that no statement has been rendered to or received by her showing the condition

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of the business or the result of its operations, or any facts relating thereto.

The respondents deny the statement that there has been no meeting of the stockholders and excuse the failure to render a statement by saying that no request has ever been made for one.

The disparity of the allegations with reference to a meeting of the stockholders of the corporation may be explained, possibly, by the fact that certain of the stockholders may have met, of which the petitioner has not been advised, and that because of such meeting those who did thus meet may consider that there has been a meeting of the stockholders of the corporation.

The respondents aver that they will furnish at any time a statement to the petitioner covering the condition of the business. Such statement is not what the petitioner here seeks.

This application asks the court to grant a writ, under and by which there may be had such an examination of the books and records of this corporation as will enable this petitioner accurately to learn and to understand what is the condition of the corporation, as to its transactions, earnings and obligations, from which she will be enabled to form some idea as to what is the value of the shares by her owned, the par value of which is $30,200.

The court has power, without question, to refuse the issuance of a writ where the application is not made in good faith. *People ex rel. Hunter* v. *National Park Bank,* 122 App. Div. 640.

There appears in the application no lack of good faith, and therefore the question is whether the plaintiff is entitled to a peremptory writ upon the conceded facts.

The respondents seem to rely somewhat upon a willingness expressed upon the part of Bainbridge W.

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Burdick, as appears from his affidavit herein, that he is willing to allow the petitioner personally to look at the books and that he is willing to furnish a statement to her.

As before stated, she does not here seek a statement. She seeks an opportunity which will enable her, with the aid of the court, to look at the books and examine them, and to draw therefrom statements and conclusions with the aid of some one competent to do the work necessary to be done, in order that she may learn what the real situation is.

It would avail little for the petitioner, assuming that she is intelligent, to look at the books of this corporation covering the period of its operations and transactions from 1908 to this time.

If she is to be given an opportunity to look at the books of the corporation, of which she is a large owner, she can only look at them intelligently through the eyes of one competent to examine books of account and similar records.

This application, therefore, contemplates an opportunity for her, with the aid of an accountant, and possibly a lawyer, to examine the books, which are the property of the corporation and not of these respondents, and in which books the petitioner has a proprietary interest jointly with the respondents. The entries in these books and records which should make up the history of the transactions of this corporation are of as much importance and interest to her as to the officers and directors of the corporation.

A domestic manufacturing company owned and controlled by the members of one family is not like a great corporation organized to transact public business which under the law is subject to visitation through public agencies and the reports of its operations are

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set forth in detail in public records to which shareholders and others alike have access.

This is a domestic manufacturing concern. Its financial condition interests only its creditors and those who make up its shareholders.

The petition of the one woman stockholder, who does not have the opportunity or the permission or the capacity to learn of the affairs of the company to the same degree as all of the other shareholders have, appeals to the sound discretion of the court to be given at least one opportunity to learn something of the real condition of the affairs of the company of which she is an owner in part.

There seems to be very little question as to the rule of law here governing. This is not a statutory proceeding, it is a common-law right.

A peremptory writ for such an examination may only issue when the facts upon which the relator relies are undisputed.

The main facts upon which this petitioner relies are practically undisputed. *Matter of Hitchcock,* 157 App. Div. 328.

Upon this application we take the facts, so far as they are disputed, as disclosed by the affidavits on the part of the respondents. *People ex rel. Port Chester Savings Bank* v. *Cromwell,* 102 N. Y. 477.

A peremptory writ should only issue where the petitioner has established a clear right to a writ as a matter of law.

The court considers that the petitioner has complied with that rule.

The common law gives to a stockholder the right to inspect the books of his corporation in a proper way, at a proper time and place for a proper purpose.

This common-law right has not been affected by legislation, and this court has the power, in its sound

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discretion, upon good cause shown, where the petitioner is acting in good faith, to enforce the right.

This right should not be, as has been well said, allowed for speculative purposes or out of curiosity, or to enable one stockholder to nag the company or the other stockholders or where its exercise would produce inconvenience.

In *Matter of Steinway*, 159 N. Y. 250, the law is established.

In the *Steinway* case the request, addressed by the petitioner to the officers and directors, was for permission to afford his accountant and attorneys access to the books of account, vouchers and records of the company covering four years, for the purpose of examining the same.

It certainly is, as has been well said, the right of every one to see that his property is well managed and to have access to the proper source of knowledge in this respect. *Matter of Steinway, supra*, 261.

The petitioner of right is entitled to inspect the books of this corporation. Such inspection should be had with due regard to all proprieties. It should not be conducted for the purpose of annoying the corporation or any of its officers. It should be expeditiously done by an intelligent and fair examiner, at such times and in such ways as will, if possible, meet with the approval of the officers of the corporation.

The examination should be made by a certified public accountant.

There should be in the examination no divulging of secret processes, if there are any, nor of lists of customers, nor of any other subjects or matters upon which the prosperity of the concern to a degree depends.

The method of conducting the examination and all details relating thereto, so far as the same can now

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be fixed, should be provided for in the order. If the parties hereto cannot agree the court, upon notice, will settle the form of the order.

Ordered accordingly.

Matter of the Judicial Settlement of the Accounts of ELIAS FINGAR, as Surviving Executor, etc., of CHRISTINA LINK, Deceased.

(Surrogate's Court, Columbia County, November, 1917.)

Statute of Limitations — what sufficient to stop running of — executors and administrators — Code Civ. Pro. § 382(1).
Evidence — documentary — witness — Code Civ. Pro. § 829.

Where letters testamentary upon the estate of one who died December 23, 1905, were not issued until July 17, 1908, and a claim against the estate for services rendered to the decedent covering a period up to January 11, 1905, and presented to the executor January 11, 1911, was not rejected until June 18, 1915, after the commencement of the proceeding for the judicial settlement of his accounts, an admission of the validity of the claim contained in a conversation between the claimant and the executor's attorney, as to which there was no contradiction, was sufficient to stop the running of the six-year Statute of Limitations under section 382(1) of the Code of Civil Procedure.

Items of disbursements made by claimant properly proven by testimony, free from objection under section 829 of the Code of Civil Procedure and properly corroborated by disinterested witnesses or by documentary evidence, allowed.

PROCEEDING upon the judicial settlement of the accounts of a surviving executor.

Stephen F. Avery, for executor.

Elmer S. Luckenbach, for Courtney V. Post, claimant.

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F. J. Collier, for Thomas F. Dusenberre and Stephen F. Avery, as executors of Catherine Van Deusen, deceased legatee.

WHITBECK, S. Trial of rejected claim upon accounting. This claim is for services rendered to the decedent for care and attention, for attending to her business matters and for disbursements connected therewith; it was verified January 11, 1911. I find nothing in the account, or in the evidence, or in the case, as to when this claim was presented to the executor except that in the brief submitted on behalf of the legatee it is stated that the claim was presented on January 11, 1911. The decedent died December 23, 1905, and letters testamentary were issued July 17, 1908. The petition in this proceeding, made and verified by the executor, was filed in the surrogate's office of this county on May 27, 1915, and citation was issued returnable on the 11th day of June, 1915, and as appears from the proof of service of citation on file the citation was served on the claimant June 3, 1915. The claim herein was not rejected until June 18, 1915.

This proceeding was, therefore, commenced on May 27, 1915. See Code Civ. Pro. § 2518. Much testimony has been presented regarding the merits of this claim, but before considering the merits I must first examine the preliminary question raised by those defending this estate against this claim.

It appears that this claim was not rejected until after this accounting proceeding was commenced and the defense is urged and was urged at the beginning of this trial that the Statute of Limitations has run against this claim and constituted an absolute bar to its allowance even if proven.

This claim covered a period up to January 11, 1905, consequently this may be taken as the latest date when

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claimant's right of action thereon accrued. By the provisions of section 403 of the Code of Civil Procedure by adding eighteen months — the time within which an action might have been brought was extended to July 11, 1906. The six-year Statute of Limitations (provided for in subdivision 1 of section 382 of the Code of Civil Procedure and which is applicable here) would then bar the prosecution of this claim after July 11, 1912. But the claimant contends that as the claim was presented in time and not rejected until after this proceeding was commenced he was under no obligation to actively pursue his legal remedies and that by the failure of the executor to reject the claim he has in legal effect admitted it. Claimant also points to evidence of a conversation had between the claimant and the attorney for the executor as testified to by claimant, as follows: "Q. Go on. A. I told him that I would like to have the burying plot dug up and graded off and I told him I would like to have a deposit made for the maintenance of the burial plot, and he said after my bill was paid and other bills was paid he did not know that there would be money enough," and argues that this was an actual admission of the claim and a promise to pay it.

While the two leading cases in the Court of Appeals in this state are often cited and referred to as authority on the question here, it does not appear to me that they involve similar circumstances as are involved here. In both of those cases the actions were on accounts stated and in those cases the court properly held that mere silence on the part of the legal representative after presentation of a claim did not constitute it an account stated. That is quite a different proposition — for if it should create an account stated there is no defense available as to the merits of the claim itself. But here the question is only as to

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whether the Statute of Limitations shall be successfully pleaded and if not the claim may still be defended upon its merits. However, conceding that these cases (*Lambert* v. *Craft,* 98 N. Y. 342, and *Schutz* v. *Morette,* 146 id. 137) are applicable, the first holds that mere silence on the part of the representative does not constitute the claim an account stated, while the latter case modifies the rule laid down in the former and seems to hold that mere silence is not sufficient and that an express promise is necessary.

I find at least two cases (*Cotter* v. *Quinlan,* 2 Dem. 29, decided by Surrogate Spring of Cattaraugus in 1883, and *Visscher* v. *Wesley,* 3 id. 301, decided by Surrogate Rollins in 1885) which hold flatly that a verbal acknowledgment of the debt by the legal representative is not sufficient to prevent the running of the statute and that a written promise is necessary.

In direct conflict with these we find the cases of *Matter of Prince,* decided by Surrogate Sexton of Oneida county in 1907 (56 Misc. Rep. 222), and *Matter of Nelson,* decided by Surrogate Tallmadge in 1909 (63 Misc. Rep. 627), both holding that an acknowledgment of the claim stopped the running of the Statute of Limitations, and that a failure to dispute or reject amounted to an acceptance or admission.

There are also several cases holding that mere silence on the part of the executor or administrator after presentation to them of a claim does not constitute an admission and does not prevent the statute from running (*Shutz* v. *Morette, supra; Matter of Van Voorhees,* 55 Misc. Rep. 185; *Matter of Neher,* 57 id. 528), and with this doctrine I am inclined to agree both upon reasoning and authority, but these cases do not preclude the further deduction that a proper admission of the claim would not prevent the running of the Statute of Limitations. This still leaves conflict,

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however, as to whether the admission may be verbal or must be in writing, and it is to be regretted that on this point the higher courts have apparently not passed.

It is my opinion that a written promise is not necessary so long as clear proof can be shown of an admission of the claim or a promise to pay the claim or sufficient evidence of an intention on the part of the representative to recognize its validity which is communicated to the claimant.

The presentation of claims to the legal representative of an estate is, both in theory and practice, quite different from presentation to the living debtor. The representative is in most cases ignorant of decedent's debts, their number and the ability of the estate to pay them in full; consequently in most estates there is a considerable period which necessarily elapses between the presentation and the payment of claims. While the courts have apparently recognized that it might be dangerous to let mere silence amount to an admission, I see no reason why a verbal admission is not sufficient. The legal representative is after all not the debtor, he is an officer of the court, guided by law and the machinery of the court in administering the affairs of the decedent's estate and closing it up, and should, and presumably will, pay only the just debts of the decedent. There must in reason be a method approved by law and practice by which the representative may assure the claimant of the validity of his claim and make unnecessary its being placed in judgment, and an admission should answer this purpose. I believe that the admission of this claim contained in the conversation of the executor's attorney and the claimant (and as to which no contradiction appears) was sufficient to stop the running of the Statute of Limitations, and I so decide.

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As to the claim, I was during the trial and am still convinced that there is merit in much of it, and find it and allow it at the sum of $200.64. In fixing this amount I am eliminating entirely the item for services rendered personally by the claimant and for which he asks $150. Undoubtedly there was employment proven by the power of attorney which is in evidence and apparently the claimant did render services under that appointment to his principal. I am also of the opinion that some services of a personal character looking toward the physical comfort of the decedent were rendered by claimant, but the proof is none too definite as to their nature and extent and there is no competent proof of the value of such services. It is true that the claimant was permitted, over objection, to place a value on those services of $150, but upon contemplation I am convinced that these services consisted in part of services necessarily involving personal contact and transactions with the decedent and which she might, if alive, contradict. This is directly prohibited by section 829 of the Code of Civil Procedure as the appellate courts have held. *Yates* v. *Root,* 4 App. Div. 442, and cases cited.

As to the items allowed, including most of the disbursements made by claimant, they seem to me to have been properly proven by evidence which is free from objection under section 829 and properly corroborated by disinterested witnesses or by evidence documentary in character.

This claim is allowed at the sum of $200.64, with interest thereon from January 11, 1911, the date of presentation of claim. The question of costs may be brought up on the settlement of the decree, which may be brought on upon notice or upon consent.

Decreed accordingly.

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Matter of the Estate of EDWIN H. WEATHERBEE, Deceased.

(Surrogate's Court, New York County, November, 1917.)

Executors and administrators — judicial settlement of accounts of — trustees — wills — devise — life estates.
Accounting — by executors — life tenants — mortgages — estoppel.

Where a testator devised to each of his three children a life estate in one of three farms together with the use and income of a certain sum of money "with which to maintain and care for said farm and its belongings," no trust being created in respect to the use of said money, the object of the testator seemingly to be to enable the life tenants to discharge their legal duty to the remaindermen by proper care of the properties devised, and said money bequests are not made conditional upon the use to which they should be applied, the life tenants are entitled to have the *corpus* of said money bequests paid over to them upon the judicial settlement of the account of the executors and trustees upon severally filing a bond.

Where upon a prior accounting it appeared that the total of the three sums of money payable to the life tenants was invested by the executors in a purchase money mortgage and then held by them and included in that account, and no objection to said investment or to the failure of the executors to pay over was then taken by the legatees, they are estopped in the present accounting from questioning the propriety of such investment.

PROCEEDING upon the judicial settlement of the account of executors and trustees.

Curtis, Mallet-Prevost & Colt, for Mary A. Milbank, petitioner.

Crescens Hubbard, for Hicks A. Weatherbee, Amy H. Weatherbee and Henrietta C. McGusty.

Warren C. Fielding, special guardian.

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FOWLER, S. In this accounting proceeding the construction of the will has become necessary. By his will the testator devises to each of his three children a life interest in one of three farms, together with the use and income of a sum of money "with which to maintain and care for said farm and its belongings." Except for the location of the farms and the amount of the money bequests the following provision for one of the children is substantially identical with the devises and bequests for the other two children in so far as their proper construction is concerned.

"*Third*, I give, devise and bequeath to my eldest daughter, Henrietta Constable Read, my farm known as Creekandall, situated at Chatham, Columbia County, New York, consisting of about 200 acres of land, being the property bought at sale on foreclosure of a mortgage held by me from Chilon Howard, together with all the furniture in the house thereon and the horses, carriages, harness and stable equipment, farming implements and other personal property upon or belonging to said farm, to have and to hold the same for and during her natural life, and together with the use and income for her lifetime of the sum of $30,000, with which to maintain and care for said farm and its belongings, and upon and after her death the same to her eldest child her surviving, if she shall leave issue in being at the time of my death, to have and to hold the same to him or her in like manner, also for and during his or her natural life, and upon his or her death, to his or her issue then surviving, absolutely and in fee, and in default of such issue to my daughter's other children or issue, if any, and in case my said daughter shall leave no child, or in the last event no other child or issue her surviving, then to my other two children equally.

"If my said daughter shall have no child in being

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at the time of my death, but shall subsequently have issue, then at and upon the death of my said daughter I give the said personal property to my other two children equally, and I devise the said farm and real estate to my said daughter's eldest child living at the time of her death absolutely and in fee, provided that he or she shall live to attain majority or shall sooner die leaving issue, and if he or she shall die during minority, leaving no issue, then to my said daughter's next heirs at law.

"Neither my daughter nor any other of said legatees shall, however, be held accountable for any of said personal property that shall perish in the using or be replaced by other articles of a like kind, though it is my wish and purpose by the money gift that such articles be restored or supplied as needed from time to time and that the buildings and fences and land be kept in good condition."

One of the daughters of the testator, Mary A. Milbank, formerly Mary A. Weatherbee, an executrix and trustee under the will, petitioned this court for an order requiring the executors to render and judicially settle their accounts, and also prays for a construction of the will in respect of the true meaning and intent of the bequest to her in the fourth paragraph of the will, "of the use and income for her lifetime of the sum of $10,000 with which to maintain and care for said farm and its belongings." The said petitioner claims to be entitled to the immediate payment of the money bequeathed.

Hicks A. Weatherbee, a son of testator, and executor and trustee under his will, and Henrietta C. McGusty, a daughter of the testator and legatee under his will, filed answers to the petition of said Mary A. Milbank, in which they severally allege that the particular farm bequeathed to each is constantly decreasing in value;

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that the soil is not fertile and largely unproductive; that the chief value of each farm is in its woodland, and that the maintenance of the fences and buildings would not increase the value of said woodland. Henrietta C. McGusty shows that the income for several years from the $30,000 bequeathed to her will exceed the entire present market value of the farm in which she has a life estate and will add little or nothing to the value of the said farm, and " that no good, valuable or useful purpose will be served by expending the money on said farm; that it is her intention to apply to the courts for leave to sell the said farm at whatever price it will bring, and that the money derived from said sale, with the interest accruing thereon, will amount to more for the remaindermen than the value of the farm itself." Hicks A. Weatherbee alleges further that the " homestead " of which he has a life estate " is a dwelling house in the village of Chatham, New York; that it is over seventy-five years old; that it is located within a few feet of the tracks of the N. Y. C. & H. R. R. R. Co.; that there is a railroad roundhouse almost direcly opposite the said homestead, and that numbers of locomotive engines are constantly appearing at all hours of the day and night and the smoke and gases from said engines, with almost no interruption, blow upon and over the said homestead, making it undesirable for occupation; that certain premises adjoining the same are occupied by Italians; that the said conditions are likely to continue indefinitely; that all moneys spent upon said homestead will be expended to no valuable purpose and will create no additional value to the remaindermen, and that it is the intention of the said Hicks A. Weatherbee to apply to the court for leave to sell the said homestead." All three of said life tenants contend that they are entitled absolutely to the

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income from the amounts respectively bequeathed to them, and are not legally bound to apply such income "to maintain and care for said farm and its belongings."

Hicks A. Weatherbee and Mary A. Milbank, as executor and executrix, also filed a petition for the judicial settlement of their account.

The special guardian for the infant children of Henrietta A. McGusty, who have contingent interests in the real estate and in the three sums of money, the use of which is bequeathed as aforesaid, contends that the income from the three funds must be used for no other purpose than for the maintenance of the various properties mentioned.

It seems clear that no trust is created in respect of the use of said sums of money. Testator's children *nominatim* take legal life interests. The object of the testator seems to be to enable the life tenants to discharge their legal duty to the remaindermen by proper care of the properties devised. The real question here is, Are the life tenants entitled to the possession of the *corpus* of the money bequests? The gift of the income to the three children was evidently testator's primary object, and the use to be made of said income secondary. The bequests are not made conditional upon the use to which they should be applied. It seems to me that the three legatees are entitled to have the three funds paid over to them. The extent of their obligation to apply the income to the purpose indicated ought to be reserved for a separate application to the Supreme Court. The rule established in *Johnston* v. *Hughes,* 187 N. Y. 446, may, however, be controlling. In that case the court said: "He (testator) merely indicated a purpose, thus making the gift his primary object and the use to be made of it his secondary purpose. Had he stated the use to be the supplying of

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clothing to the inmates of the hospital and the sisters had found that it was unnecessary to use it for clothing, but that its use was necessary for the supplying of food, it would hardly be claimed that the use suggested operated to deprive the bequest of its absolute character and constituted the gift conditional; or even that the diversion of its use to another person worked a forfeiture. Should a testator leave to his daughter a sum of money with which to purchase for her use a diamond necklace, the gift would be absolute and vest the money in her, and if she should thereafter choose to invest it in bonds instead of diamonds there would be no cause for complaint that the gift was invalid." This matter presents very interesting questions concerning gifts of personalty limited to follow the legal title to land. The scheme is very similar to an entail. The wise old father evidently intended that life tenants should live on the farms devised to them severally, and that his money should be used on the farms by the life tenants. As there is to be a petition for sale addressed to the Supreme Court, that tribunal should pass on the will generally.

It appears also that the total of the three sums of money payable to the three life tenants was invested by the executors in a purchase money mortgage, which is now held by the executors. The legatees are estopped from questioning the propriety of this investment, because of the prior accounting decree dated March 20, 1914. In that accounting was included the $55,000 mortgage, and no objection to such investment, or to the failure of the executors to pay over, was then taken by the legatees. The mortgage may be sold by the executors and the proceeds paid to the three legatees, or, if the parties prefer to avoid a sale, the decree may provide that the interest of each legatee therein be assigned and transferred to said legatees. In either

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event each legatee should file a bond, to be approved by the surrogate. *Matter of McDougall,* 141 N. Y. 21.

Decreed accordingly.

Matter of the Estate of CAROLINE A. BRUNDAGE, Deceased.

(Surrogate's Court, New York County, November, 1917.)

Wills — provisions of — devise of real property — insufficiency of assets to pay debts — executors and administrators — mortgages — trusts — remainders — bequests — legacy — abatement.

A devisee of real property subject to mortgage must satisfy it out of his own property without resorting to the executor of his testatrix unless by the will payment of the mortgage is otherwise directed.

A testatrix whose assets at the time of her death were insufficient to pay the legacies and to set up the trusts created by her will died seized of fourteen pieces of real estate, ten of which, at that time, were subject to mortgage and included two pieces specifically devised, the income from one of which, since that time, had not been sufficient to pay the necessary carrying charges. The executors and trustees were authorized and directed to keep the estate in good order and repair, pay all taxes, assessments or liens which might be assessed or levied thereon, keep the same insured, pay off all mortgages and incumbrances on real estate which might exist thereon at the decease of testatrix, and they were also empowered to sell, mortgage or lease any or all property not specifically devised, as they might from time to time deem best for the purpose of carrying out the provisions of the will. *Held,* that it was the intention of testatrix that all mortgages, being liens upon her property at the time of her death, should be paid from her general estate.

A certain clause of the will provided that upon the death of the various life beneficiaries of income the principal should be returned to and become a part of the residuary estate, or, in certain instances, should go to the issue of the par-

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ticular beneficiary, if any, or in default of such issue the same should become a part of the residuary estate. By another clause of the will all the rest, residue and remainder of the estate, both real and personal, not otherwise specifically disposed of, was devised and bequeathed to a nephew of testatrix for life and on his death the trust for his benefit should cease and the property divided among his surviving children and the issue of any deceased child *per stirpes*. *Held*, that the remainder of the various trust funds must first be applied in payment of general legacies.

A bequest to an incorporated cemetery association, in trust to apply the income therefrom to caring for and keeping in good order the burial plot of testatrix in said cemetery, is to be deemed a part of her funeral expenses, does not abate and should be paid in full.

By the third clause of her will testatrix bequeathed to her executors and trustees the sum of $5,000 to be used by them for the erection of a vault upon her burial plot, but on account of the size of said plot the rules of the cemetery prohibited the erection of a mausoleum, and it appeared by the affidavit of one of the executors that a very ample allowance for the performance and completion of the work necessary to the fullest compliance possible with the directions of the will would not exceed the sum of $1,500. *Held*, that as the trust so created had partially failed it was valid as a charitable use, and under the doctrine of *cy-pres* the executors may set up a trust in the sum of $1,500 and carry out as near as possible the trust as set forth in said clause of the will, without prejudice to the other legatees; that the balance of the sum set apart by said clause becomes a part of the general assets of the estate and should be first applied to the payment of the general legacies.

Testatrix bequeathed to the "Home for Old Men and Aged Couples," etc., the sum of $5,000 on the death of her husband's niece "as hereinafter mentioned" to whom by the next clause of the will was bequeathed the sum of $20,000 for life and on her death the sum of $5,000 "as hereinbefore mentioned" was given to said "Home." By abatement the fund for the benefit to the said niece was reduced to the sum of $8,920.32. *Held*, that the bequest to the "Home" was a demonstrative legacy payable out of the principal of the trust fund, and that a proposed method of distribution thereof by which the "Home" was to receive one-quarter thereof plus its proportionate share

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of the remaining three-quarters of said fund, which under the proposed decree is to be distributed ratably among the other legatees entitled thereto, was erroneous.

PROCEEDINGS upon the judicial settlement of the accounts of executors and trustees.

Geller, Rolston & Horan, for temporary administrator and executors and trustees.

Moen & Dwight, for Woodlawn Cemetery.

David B. Simpson, for Gertrude L. Forman and others.

Silas A. H. Dayton, attorney in person.

Bissell & Elsasser, for Helen A. French.

Louis W. Dinkelspiel, for Mary Ewer Maynard and others.

Richmond Weed, for Home for Old Men and Aged Couples.

Edward J. Flanagan, for Annie S. Kress, as general guardian, etc.

Michael J. Egan, special guardian.

Miller, King, Lane & Trafford, for St. Luke's Hospital.

Brush & Crawford (John J. Crawford, of counsel), for William H. Young.

FOWLER, S. The executors and trustees having filed their accounts, a judicial construction of the will of

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testatrix becomes necessary. Such construction has been postponed, by consent, until the settlement of the decree now proposed. The scheme of the will of Caroline A. Brundage is substantially as follows: By the first clause of her will the testatrix revokes and annuls all former wills. By the second clause she directs the payment of her debts, funeral and testamentary expenses. By the third clause she provides for the erection of a vault in Woodlawn Cemetery. By the fourth clause she gave $1,000 to Woodlawn Cemetery for the care of her burial plot. By the fifth clause she gave specific bequests of personal effects to various friends and relatives. By the sixth clause she gave cash legacies amounting to $59,000. By the seventh clause she created thirteen separate trust funds, aggregating $180,000, for thirteen individuals for life, of which the remainders in funds aggregating $55,000 are directed to go to her residuary estate, and the remainders in the other funds to the issue of the beneficiary, and on the failure of such issue to the residuary estate. By the eighth clause testatrix specifically devised four pieces of her real property. By the ninth clause she gave the income of the rest, residue and remainder of her property, both real and personal, to William Henry Young for life and the remainder to his issue. By the tenth clause she nominated her executors and trustees. Testatrix died seized of fourteen pieces of real estate. Ten of these pieces were subject to mortgage at the time of her death, including the two pieces specifically devised to William Henry Young and Victorine Skidmore by the eighth clause of her will. The assets of the estate of Caroline A. Brundage are insufficient to pay legacies and to set up the trusts in full, and they will have to abate by more than fifty per cent.

The first question arising from the construction of the will of Caroline A. Brundage has to do with the

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provisions providing for the paying off of the mortgages upon her real property, and more particularly the mortgages on the property specifically devised by the eighth clause of her will. The eighth clause of such will provides as follows: "*Eighth.* I make the following specific devises of real property, to wit: (a) To my cousin, Victorine Skidmore, the house known as No. 53 Park place, borough of Brooklyn, city of New York, during her life, with remainder to her grandson, Minthorne T. Brundage Kress, and if he does not survive her, then to her other surviving descendants *per stirpes.* (b) To my nephew, William Henry Young, the net rents of premises No. 125 East Thirty-fourth street, borough of Manhattan, city of New York, during his life, and on his death to his surviving children and issue of deceased children, if any, *per stirpes,* and if he leave no descendants, then I devise said premises No. 125 East Thirty-fourth street to my grandnephews, George Lyle Forman and Charles E. B. Forman, in equal shares during their respective lives, with remainder to their children, in equal shares, *per stirpes.* If either of the said Formans shall have died leaving a child or children him surviving, the same shall take the deceased parent's share * * *."

At the time of the death of said testatrix the premises known as No. 53 Park place, in the borough of Brooklyn, city of New York, were subject to a mortgage made to secure the payment of the principal sum of $4,000, with interest thereon at five per cent per annum, and the premises known as No. 125 East Thirty-fourth street, borough of Manhattan, city of New York, were subject to a mortgage made to secure the payment of the principal sum of $35,000, with interest thereon at the rate of five per cent per annum.

By the tenth clause of her will testatrix provided as

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follows: "*Tenth.* I hereby appoint the Farmers' Loan and Trust Company of the city of New York to be the executor of and trustee under this will, together with my husband, should I marry and be survived by a husband; or, if not, together with Rev. Nathan A. Seagle, of No. 120 West Sixty-ninth street, borough of Manhattan, city of New York, and I authorize and direct my said executors and trustees to keep all my estate in good order and repair, to pay all taxes, assessments or liens which may be assessed or levied thereon, to keep the same insured, to pay off all mortgages and incumbrances on real estate which may exist thereon at the time of my decease, and I also empower them to sell, mortgage or lease any or all of my property not herein specifically bequeathed, as they may from time to time deem best for the purpose of carrying out the provisions of this will."

The income from the premises known as No. 125 East Thirty-fourth street has not been sufficient to pay the necessary carrying charges. The accountants have paid such carrying charges out of the income from the general estate upon the theory that said mortgages were payable out of the general estate, and objection to such payments raises the question as to the true construction of the will of testatrix in respect to these matters.

It is well settled that where real property subject to a mortgage is devised the devisee must satisfy the mortgage out of his own property without resorting to the executor of such testator, unless there be an express direction in the will of such testator that such mortgage be otherwise paid. Real Prop. Law, § 250; *Searles* v. *Brace,* 19 Abb. N. C. 10; *Waldron* v. *Waldron,* 4 Bradf. 114; *Matter of Hopkins,* 57 Hun, 9; *DeGraaf* v. *Cochrane,* 21 App. Div. 381; *Sutherland*

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v. *Gesner*, 27 Hun, 282; *Clark* v. *Goodridge*, 51 Misc. Rep. 140, 155.

It is urged on behalf of the objectants that the direction to pay off all mortgages and incumbrances on the real estate of Caroline A. Brundage, existing thereon at the time of her decease, as provided in clause 10 of her will, is not such an express direction as to bring it within the exception set forth above. On the contrary, they urge that the direction applies only to the real estate which is subject to the future action and control of the executors and trustees under the will. In this connection it is urged on behalf of objectants that in the cases cited as authority for the rule above stated the testator specifically directed, in each instance, that the particular mortgage should be paid out of the general estate, while in the will now under review in this proceeding the direction to pay off the mortgages is contained in the clause naming the executors and trustees, and refers only to the property which the trustees took under the will.

I am of the opinion that although the executors and trustees may have no duty relating to the properties devised by clause 8 of the will, the mortgages thereon are by the will directed to be paid out of the general estate. It is the intention of the testatrix that is the governing consideration, and in my judgment the leading and controlling intention of Caroline A. Brundage was that all mortgages, being liens upon her property at the time of her death, should be satisfied and paid out of her general estate by her executors.

The objectants argue further that the initial clauses of paragraph 10 of the will relating to repairs, taxes and assessments can have reference only to the property over which the executors had future control, and that consequently testatrix must have intended her direction to pay off all mortgages on her property to

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apply only to so much of the property as was so held by the executors. However correct this interpretation of the initial clauses of paragraph 10 may be, it is not so inconsistent with my interpretation of the succeeding clause of that paragraph, which contains what I consider to be a specific direction to pay off all mortgages existing upon her property at the time of her death, as to limit her express intention in any manner. The testatrix does not specify severally the mortgages to be paid off. Neither does she except any. Her language naturally includes all mortgages. It is only in the final clause of paragraph 10, wherein the testatrix authorizes and empowers her executors and trustees to sell, mortgage or lease " any or all of my property not herein specifically *bequeathed* " that the property devised under clause 8 is specifically excepted from the provisions of paragraph 10. The intention of the testatrix, in my opinion, is clear, however inartificially it may be expressed. In my judgment she intended all the mortgages on all her property to be paid off. Even though, as argued, one interpretation may be as probable as the other, which I think not sound, the construction given the will by the surrogate is the superior construction, inasmuch as it favors the kin of the testatrix. William Henry Young is the nearest male relative of the testatrix, and the interpretation accorded comes within that principle of construction which favors an interpretation making for the benefit of a near relative as against strangers to the blood. *Wood* v. *Mitcham,* 92 N. Y. 375, 379; *Quinn* v. *Hardenbrook,* 54 id. 83; *Scott* v. *Guernsey,* 48 id. 106; *Kelso* v. *Lorillard,* 85 id. 177, 182.

The second question submitted to me concerns the payment of the general legacies. As noted above, the assets of the estate have proved insufficient to pay the legacies in full and to set up the trusts created under

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the will of Caroline A. Brundage. By the ninth clause of her will testatrix provided as follows: "*Ninth.* The income of all the rest, residue and remainder of my property, both real and personal, wherever situated and not herein otherwise specifically disposed of, I give, devise and bequeath to my nephew, William Henry Young, during his life; and on his death, the trust hereby created shall cease and said property shall be divided among his surviving children and the issue of any deceased child, *per stirpes.*"

By the seventh clause of her will testatrix provided that upon the death of the various persons to whom she had bequeathed the income of certain sums therein mentioned during their respective lives the principal sums so held in trust for said respective beneficiaries should, upon their respective deaths, be returned to and become part of her residuary estate, or in certain instances that they should go to the issue of the beneficiary, if any. The seventh clause further provided that if such beneficiary should leave no issue the same should become part of the residuary estate of testatrix.

By subdivision K of the seventh clause of her will testatrix established a trust fund of $20,000, the income of which she directed to be paid to Mary E. Taylor during her life, with remainder over. Mary E. Taylor died on the 23d day of February, 1914, and the principal of the fund held for her benefit during her life has therefore become distributable. Question has arisen as to whether this sum should be disposed of as directed by the ninth clause of this will, or whether it should be applied toward the payment of the other legacies bequeathed thereunder. As to this question my conclusion is that the remainders of the trust funds, limited by the seventh clause of testatrix's will, must be applied first to the payment of the general

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legacies given under the will. *Matter of Title Guarantee & Trust Co.*, 195 N. Y. 339.

The third question submitted to me has to do with the legacy bequeathed to the Woodlawn Cemetery in the fourth clause of testatrix's will, which reads as follows: "*Fourth.* I give and bequeath to the corporation known as the Woodlawn Cemetery, in the city of New York, the sum of one thousand dollars ($1,000); in trust, nevertheless, to apply the income from said sum for the purpose of caring for and keeping in good order my burial plot in said cemetery, in which are buried my deceased husband, father-in-law and mother-in-law." In respect to this particular legacy the decree should provide for its payment in full. Such bequests are deemed to be a part of the funeral expenses and do not abate. *Matter of Maverick*, 135 App. Div. 44; affd., 198 N. Y. 618.

The fourth question has to do with the trust created under the third clause of the will of the testatrix, which provides as follows: "*Third.* I give and bequeath to my executors and trustees hereinafter named the sum of five thousand dollars ($5,000), to be used by them in the erection of a vault upon the burial plot owned by me in Woodlawn Cemetery, in the city of New York, and I direct them to move the monument now upon the said plot to the rear of the said plot, and to remove the bodies of my deceased husband, father-in-law and mother-in-law, now buried in said plot, to the said vault, when erected, and I further direct that the headstones over the present graves of my deceased father-in-law and mother-in-law shall remain upon the said plot after the removal of their said bodies to the said vault, and that the steps now upon the said plot be retained and used in front of the said vault."

Submitted with the proposed decree is an affidavit by Rev. Nathan A. Seagle, one of the executors and

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trustees, which was served upon all the parties who appeared herein. This affidavit is part of the papers filed in this proceeding, and, as it is uncontradicted, the contents thereof are to be treated as true. Code Civ. Pro. § 2546. The affidavit sets forth in substance that by the third clause of her will the testatrix bequeathed to her executors and trustees the sum of $5,000 to be used by them in the erection of a vault upon the burial plot owned by her in Woodlawn Cemetery. Inquiries made by the affiant of the Woodlawn Cemetery Corporation establish the fact that, as the plot owned by the testatrix measured only sixteen feet two inches in width, the rules of the cemetery prohibit the erection of a mausoleum. The affiant also ascertained that no property on either side of the plot in question could be acquired, and that it will be therefore necessary to construct an underground vault in order to carry out as far as possible the wishes of the testatrix expressed in the third clause of her will. The affiant consulted the cemetery authorities concerning the cost of a suitable underground vault, and the expense necessarily to be incurred in complying with the other provisions of the third clause of her will, and he states that a very ample allowance for the performance and completion of the work necessary to the fullest compliance possible with the provisions of the will will not exceed the sum of $1,500. I am therefore of the opinion that the purpose for which the trust was created in the third clause of the will of testatrix has partly failed. The trust created by the third clause of testatrix's will is valid as a charitable use. Pers. Prop. Law, § 13-a. This was not a charitable use at common law. *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255; *Hoare* v. *Osborne*, L. R. 1 Eq. 585; 33 London Law Quar. Review, p. 358. Under the *cy-pres* doctrine, formerly inapplicable in this state (*Beekman* v. *Bonson*, 23 N. Y. 298), but now by statute made

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applicable to charitable trusts in this state (Laws of 1893, chap. 701, amd. by Laws of 1901, chap. 291), the executors may set up the trust in the sum of $1,500 and they may carry out as near as possible the trust purposes set forth in the third clause of the will of testatrix. The fund of $5,000, given in trust under the third clause of the will, has not abated so as to bring it below the sum of $1,500 directed to be applied as above. The trustee may therefore set up the trust to the extent of $1,500, without prejudice to the other legatees. The balance of the sum set apart by the third clause of the will becomes part of the general assets of the estate, and it should be applied as directed in the determination of the second question discussed herein.

The fourth question has to do with the legacy payable to the Home for Old Men and Aged Couples out of the remainder of the fund held in trust for Mary E. Taylor during her life, who survived the testatrix and is now deceased.

The sixth paragraph of testatrix's will is as follows: "*Sixth.* I make the following bequests of cash, to wit: * * * (h) To the Home for Old Men and Aged Couples, Amsterdam avenue and One Hundred and Twelfth street, borough of Manhattan, city and state of New York, the sum of five thousand dollars ($5,000) on the death of Mary E. Taylor, *as hereinafter mentioned.*"

The seventh clause of the will of testatrix reads as follows: "*Seventh.* I give and bequeath the following named sums of money in trust to the persons named, with remainder as stated respectively: * * * (k) To my husband's niece, Mary E. Taylor, daughter of Theodore B. Taylor, the income on the sum of twenty thousand dollars ($20,000) during her life, and on her death the sum of five thousand dollars ($5,000) *as hereinbefore mentioned* shall go to the Home for Old Men

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and Aged Couples, Amsterdam avenue and One Hundred and Twelfth street, borough of Manhattan, city of New York, and the sum of fifteen thousand dollars ($15,000) shall become part of my residuary estate." The fund given for the benefit of Mary E. Taylor was reduced by abatement to the sum of $8,920.32. The accountants have adopted the theory in their proposed decree that the Home for Old Men and Aged Couples is entitled to one-quarter of the principal fund, plus their proportionate share of the remaining three-quarters of said fund, which, under the decree proposed, is to be distributed ratably among the other legatees. I am of the opinion that the proposed method of distribution is in this instance erroneous. The bequest to the Home for Old Men and Aged Couples is a demonstrative legacy. A demonstrative legacy is a bequest of a certain sum of money, stock or the like, payable out of a particular fund or security. *Crawford* v. *McCarthy*, 159 N. Y. 519.

The remaining question has to do with the charging of interest in the decree on the sum of $800 interest paid to Mary E. Maynard since the death of testatrix in 1909 on the sum of $5,000 held by the trustees for her benefit under the will. The proposed decree charges the sum of $46.80 interest against the balance of accrued income to May 1, 1917, on the assumption that as the cash income in the hands of the executors and trustees has earned interest at two per centum per annum the accountants would have had more in their hands payable at present to all of the beneficiaries had the income payable to Mary E. Maynard not been advanced. Consequently they propose that the amount payable to her under this decree should be charged with interest at the same rate as that earned by the amounts retained by them.

With this proposal I am not in accord. Subdivision

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(d) of clause seventh of the will reads as follows: "*Seventh.* * * * (d) To Mary Ewer Maynard, wife of George Maynard, of the city of New York, the income on the sum of five thousand dollars ($5,000) during her life; and on her death, said sum to become part of my residuary estate."

The beneficiary was obviously entitled to the payments made to her during the past eight years on account of the income to which she was entitled under the provision of the will set forth above. The payments to her were not advances and do not carry interest.

Decreed accordingly.

ARTHUR D. WOLF, Respondent, *v.* UNITED STATES CASUALTY COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, November, 1917.)

Contracts — written — interpretation.
Insurance (accident) — policy of — contracts — debenture certificate — judgments — actions.

A written contract is to be interpreted in the sense in which the promisor had reason to suppose it was understood by the promisee.

In an action to recover one-half of the premiums paid by plaintiff to defendant during a period of twenty years upon a policy of accident insurance, attached to which was a debenture certificate entitling plaintiff to certain benefits, with coupons annexed, the contention of plaintiff that the policy and the certificate must be construed to mean that the privilege of collecting one-half of the gross premiums was earned by the insured if and when he had paid his annual premium for any immediately preceding continuous period of twenty years without collecting any loss, upheld, and a judgment in favor of the plain-

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tiff affirmed, it being clear that the purpose of the defendant in issuing the debenture certificate was to permanently attach to itself any person who took a first policy by offering to him a substantial inducement to renew it for at least twenty years.

APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fifth district, after a trial by a judge without a jury.

Carl Schurz Petrasch (Francis X. Mooney, of counsel), for appellant.

Sidney Rossman, for respondent.

BIJUR, J. This case was submitted on an agreed state of facts, and the only question involved is as to the interpretation of a written instrument. The action is brought for one-half of the insurance premiums paid by plaintiff to defendant during a period of twenty years beginning February 20, 1897. The policy was one of accident insurance dated February 20, 1896. Attached to it was a debenture certificate with certain coupons annexed. In substance, the contract between the parties thus evidenced was that in consideration of the payment by plaintiff of one annual premium in advance on the policy named the debenture certificate was issued entitling plaintiff to the following benefits: "In the event that the premium on the said policy is fully paid annually in advance for five consecutive years" the insured might, within a certain interval after the expiration of the five years, detach coupon No. 1 and receive an extension of his policy for six months, or he might retain coupon No. 1 "until another five year period had elapsed," and upon the same proviso obtain an extension of fifteen months,

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or he might retain coupons Nos. 1 and 2 similarly until the lapse of another five-year period and obtain a gratuitous extension of two years and six months. Finally, he might retain all three coupons until the lapse of another five-year period, a total of twenty years, and obtain from the company a payment of "50 per cent of the gross premiums paid by him during full period of twenty years," provided further that if any loss has been paid to the insured during the period or periods covered by the certificate there shall be no return of premium in cash, and the extension of time provided for in the policy shall be only for such period as the value of the respective coupons in premiums less the amount of the loss so paid to the insured shall be sufficient to purchase. There are other details of this peculiar arrangement, but they are not material to the determination of the present controversy.

It appears that during the first year after the issuance of the policy the plaintiff collected a loss. No loss has since accrued, and on February 28, 1917, the assured made a demand for $240, being one-half of the gross premiums, $480 ($24 annually), which he had paid for the period February 20, 1897, to February 20, 1917. The policy itself provides that "it may be cancelled by the company at any time by mailing written notice thereof to the insured."

The contention of the plaintiff is that the policy and the debenture certificate must be construed to mean that the privilege of collecting one-half of the gross premiums is earned by the assured if and when he has paid his annual premium for any immediately preceding continuous period of twenty years without collecting any loss; or, perhaps to put it in another way, that not only the policy itself is renewed by the acceptance of a new premium by the company, but that the

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debenture certificate must be deemed similarly renewed.

The defendant insists, on the other hand, that, regardless of how long the policy may be renewed, the debenture certificate must be read as referring only to an identified period of twenty years beginning with the date of the issuance of the policy.

In my opinion, the plaintiff's construction is the correct one, and so the learned judge below has found. The debenture certificate significantly omits to designate the respective periods as beginning at any particular date, speaking of them merely as "five consecutive years" or "another five-year period."

Applying common business judgment to the interpretation of the arrangement represented by these instruments, it is clear that the purpose of the defendant in issuing the debenture certificate was to attach to itself permanently any person who took out from it a first policy by offering him a substantial inducement to renew it for at least twenty years. If upon the taking out of such a policy, and the occurrence of a loss in the first year, the assured would in substance lose all the benefits of the debenture certificate the inducement would, *ipso facto*, disappear. It is reasonable to assume that the company had no such result in mind, but intended that under such circumstances the assured should renew his policy from year to year until upon the lapse *without a loss occurring* of five, ten, fifteen or twenty years the assured might become entitled to the respective benefits provided for, and during the meantime be induced to renew by the expectancy of the enjoyment of those benefits. My inference that it was intended that the policy might be renewed from year to year for an indefinite period by the assured at his option is not unreasonable in view of the fact that this was a mere accident policy in which the item of the

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personal equation is less significant, and is confirmed by the exceedingly significant fact referred to in the stipulation that on February 20, 1897, the defendant wrote and issued policies of insurance identical in form with the policy of insurance issued to the plaintiff for the same premium and with a similar debenture certificate and without physical or other examination of an applicant. Although objection was taken by defendant to the admission in evidence of the last named facts as incompetent, irrelevant and immaterial, I think that as there is a manifest ambiguity in the instrument these facts are material to assist in its interpretation.

With them in mind, it surely would be absurd (if we interpret the contract as the defendant would have it) that the plaintiff should, on February 20, 1897, renew his old policy although by the loss which he had collected during the preceding year he had already parted with a substantial part of the value of the debenture certificate, whereas, without any additional expense or trouble to himself beyond the mere form, he could have obtained a new policy with all the same privileges and thus start on the same date with a "clean slate." It is equally absurd to imagine that the company would expect him to so renew what I might call his impaired policy or that the impaired debenture certificate would act under those circumstances as an inducement toward continued renewals of the policy. Moreover, the conduct of the insured in another respect, as also one of the terms of the certificate to which I have not alluded, add further weight to this view.

By the terms of the certificate, any loss collected by the assured during the preceding twenty years would deprive him of the right to the return of half the gross premiums at the end of the twenty-year period, while

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it would merely reduce the annual gratuitous extension which he might obtain at the end of the five, ten and fifteen-year periods respectively. Plaintiff permitted all these periods to elapse without making any claim for an extension on the assumption that he would receive the return premium at the end of the twenty years, provided, of course, he collected no loss during the last five. The hardship of this provision, if interpreted as the defendant would have it, merely fortifies the interpretation which I have adopted. But the conduct of the insured evidences clearly his understanding of the arrangement. If I regarded the respective contentions of the two parties as to the interpretation of the instrument as closely balanced (which I do not), I think we would be compelled to hold with the plaintiff, because of the recognized rule that an instrument must be construed against the party who has himself composed its language, and in particular: "It is a rule of law, *as well as of ethics*, that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee." *Hoffman* v. *Ætna Ins. Co.*, 32 N. Y. 405, 413; *White* v. *Hoyt*, 73 id. 505; *Nellis* v. *Western Life Ins. Co.*, 207 id. 320, 333, 334.

The judgment should, therefore, in my opinion, be affirmed, with twenty-five dollars costs to respondent.

PHILBIN and ORDWAY, JJ., concur.

Judgment affirmed, with costs.

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ADELAIDE R. READ, FISHER A. BAKER and CHARLES A. PEABODY, as Executors of and Trustees under the Last Will and Testament of JOHN DOWNEY, Deceased, Respondents, *v.* BENO LEVY and SAMUEL LEVY, Individually and as Partners Doing Business under the Firm Name of BENO LEVY & COMPANY, Appellants.

(Supreme Court, Appellate Term, First Department, November, 1917.)

Verdict — in action for rent — lease — evidence — when verdict should not be set aside.

Where, in an action for rent of the fourth loft of a building, the testimony of defendants tended to establish their defense of constructive eviction because of their inability to ship goods owing to the suspension of elevator service provided for by the lease, and that they acted with reasonable promptness in leaving the premises, a verdict in their favor should not have been set aside; and an order granting plaintiffs' motion to set aside the verdict will be reversed and the verdict reinstated.

APPEAL by defendants from an order of the Municipal Court of the city of New York, borough of Manhattan, ninth district, granting plaintiffs' motion to set aside a verdict rendered in favor of defendants.

Jacob Manheim, for appellants.

Montgomery & Peabody (W. Cleveland Runyon, of counsel), for respondents.

PHILBIN, J. The action was brought for rent for the months of July, 1915, to February, 1916, on a written lease of the fourth loft of a building in Houston street, in the borough of Manhattan. The lease was for one year from the 1st of February, 1915.

The answer of the defendants admits that the rent sued for has not been paid. It sets forth, as a sepa-

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rate defense, that the elevator in said premises was appurtenant to the latter and inseparably incident thereto for the purpose of access and egress; that without the use of the elevator, as was well known to the plaintiffs when they leased the premises, the defendants could not have the beneficial use of the premises; that the elevator was indispensably necessary for the transaction of defendants' business which consisted of the manufacture and sale of ladies' hats; that the elevator was not maintained in repair and condition so that it could be used by defendants, their employees and customers; that defendants well knew the condition of the elevator from the 1st of February, 1915, until the defendants vacated the premises on the 15th of June, 1915; that during that period it was out of repair, not in running order or operated by plaintiffs; and that plaintiffs repeatedly promised to make repairs, but did not do so. It is further alleged that for the above reasons defendants were compelled and did remove from the premises on the 15th of June, 1915. The defendants make no counterclaim.

The clause in the lease relating to the elevator reads as follows: "And the parties of the second part are to have steam for heating said fourth loft and the use in common with the other tenants of the elevator provided for the building; the parties of the first part to use due diligence in furnishing said steam for heating the premises hereby demised and power to operate the elevator during the usual business hours, except Sundays and holidays, and one-half hour during the noon hour, but do not guarantee an uninterrupted supply."

The jury brought in a verdict for the defendants, but, on motion of the plaintiffs, it was set aside. The court assigned no reasons for its decision. It is undisputed that the elevator service was suspended at times for repairs.

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The defendants were the only witnesses produced on their behalf. They testified that the elevator stopped running at times for a day or two days during February, 1915, and later it stopped running for ten days; that they complained to the man employed by the plaintiffs in the building, and who operated the elevator, that their customers did not come up to their loft; that he told them to speak to one Walker, the real estate agent having charge of the property, and defendants did so. They told Walker that they could not do any business, and he said he would try and fix the elevator. He later did so, the work taking two or three days. About a week later the elevator again stopped and defendants protested to Walker. It was put in order, but operated for only four or five days, when it again stopped and remained idle for a week. This last occasion was in May or June. In April it was out of order for about two weeks. Before defendants moved out, they told Walker they could not do any business; that they could not stay any longer. They removed on June 15, 1915, but paid the rent for that month, which became payable on the first of the month. One of the defendants further testified, without objection, that the man employed in the building said that if the estate would spend a little money on the elevator it would be all right. It was the early part of May when it stopped for ten days. The conditions got worse from February until defendants moved out. It was further stated by defendants that they were unable to ship goods because of suspension of the elevator service.

On behalf of the plaintiffs, Walker was called as a witness. He admitted that repairs had been necessary, but said they were promptly made. He received no complaints from the month of February to June. The elevator was not stopped two weeks in May, but it

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was stopped only on three occasions. The elevator was operated by a concern known as G. F. Hall Company under a contract with the plaintiffs. One MacLoud, an employee of the company, was the only other witness called by the plaintiffs. He had the inspection of the elevator and visited it daily. He stated it had been shut down only on one entire day and for two half days.

If the testimony of the defendants was true, they establish their defense of constructive eviction, and it was for the jury to determine whether it was true. *Lawrence* v. *Mycenian Marble Co.*, 1 Misc. Rep. 105; *Hayden Co.* v. *Kehoe,* 177 App. Div. 734. According to their testimony, the defendants acted with reasonable promptness in leaving the premises. *Seaboard Realty Co.* v. *Fuller,* 33 Misc. Rep. 109. They left on June 15, 1915, and the elevator had stopped for ten days in the preceding month according to their statements. We think that a question of fact for the jury was presented and, it having resolved it in favor of the defendants, the verdict should not have been disturbed.

Order reversed, with thirty dollars costs, and verdict reinstated, with costs.

ORDWAY, J., concurs.

BIJUR, J. (concurring). I concur on the ground that as the order setting aside the verdict does not specify the grounds upon which it is granted and no opinion was delivered (See Gen. Rules of Practice, rule 3), rule 31 of the General Rules of Practice compels the inference that it was granted "on the exceptions taken during the trial," and no questions of law appear in the record to warrant any disturbance of the judgment.

Order reversed, with costs.

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LOUIS NERENBERG, Respondent, v. GEORGE D. KEITH et al., Appellants.

(Supreme Court, Appellate Term, First Department, November, 1917.)

Constitutional law — service of process — nonresidents — attachment — Municipal Court Code, § 48.

Attachment — warrant of, against nonresident — service — pleading — affidavits — Code Civ. Pro. §§ 636, 682 — Municipal Court Code, §§ 40, 54.

Section 48 of the Municipal Court Code relating to the service of the summons and complaint and other papers in an attachment suit immediately upon the making of the inventory, in so far as it does not provide for notice to the defendant but permits judgment to be entered against a nonresident upon the mere service of process upon the person in whose possession the property attached is found, violates the "due process" clause of the Constitution of the United States and of the Constitution of the state of New York.

Where, under a warrant of attachment granted in an action brought in the Municipal Court of the city of New York against nonresident defendants to recover for failure to deliver certain goods according to contract, a certain account due to defendants from a resident debtor was levied upon, and it appears that the only service of the summons and complaint and other papers, of all of which defendants had no notice, was made by delivery thereof to said resident debtor, a judgment entered in favor of plaintiff against defendants, who did not appear, is without due process of law and will be vacated on the ground that it is null and void.

The provision of section 54 of the Municipal Court Code and of section 682 of the Code of Civil Procedure, under which a motion to vacate an attachment must be made before the actual application of attached property or the proceeds thereof, presupposes a valid notice to the defendants of the pendency of the proceeding and does not preclude a motion to vacate the attachment promptly upon discovery of its existence.

While an allegation of the complaint that plaintiff was ready to receive the goods was sufficient for the purposes of the plead-

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ing, it was necessary that the affidavit on which the attachment was granted should state facts from which the court could determine whether said allegation of the complaint could be substantiated, and the affidavit failing to show facts supporting the allegation of the complaint the warrant of attachment was improperly granted and should be vacated.

A statement in the moving affidavit that the defendants were justly indebted to the plaintiff in a certain sum over and above all payments, set-offs or counterclaims which defendants have against the plaintiff, "as near as they are known to deponent," does not comply with section 40 of the Municipal Court Code and section 636 of the Code of Civil Procedure.

APPEAL by defendants from an order of the Municipal Court of the city of New York, borough of Manhattan, first district, denying a motion to vacate and set aside a judgment and warrant of attachment against defendants.

Jay C. Guggenheimer (Charles H. Meyer, of counsel), for appellants.

Max Silverstein, for respondent.

ORDWAY, J. The plaintiff, claiming to have made a contract with the defendants for the sale to them of a quantity of "denims," commenced an action against the defendants for damages for failure to deliver according to contract, by obtaining a warrant of attachment against the defendants as non-residents, and levying upon a certain account due to defendants in New York city. The only service of the summons, complaint and other papers was by delivery thereof to the debtor of the defendants in accordance with section 48 of the Municipal Court Code, which is as follows:

"Immediately upon making the inventory, the marshal must serve the summons, if it has not yet been served, together with the warrant of attachment and

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inventory, upon the defendant by delivering to him personally a copy of each, if he can with reasonable diligence be found within the city, or, if he cannot be so found, by leaving a copy of each, certified by the marshal, at the last place of residence of the defendant in the city, with a person of suitable age and discretion, or, if such person cannot be found there, by posting them on the outer door, and also depositing another copy of each in the postoffice, inclosed in a sealed post-paid wrapper, directed to the defendant at his residence; or, if the defendant has no place of residence in the city, by delivering them to the person in whose possession the property attached is found.

"If personal service of the summons upon the defendant has previously been made, the marshal must serve the warrant and inventory as herein provided."

No other service or notice appears to have been made or given to the defendants and they not appearing plaintiff entered judgment against them for the amount demanded in the complaint, with costs, and collected the attached account and applied it in satisfaction of the judgment.

Defendants, learning of these proceedings, four days after the entry of judgment, made a motion to vacate the warrant of attachment and the judgment, on the ground that the papers on which the attachment was granted were insufficient and that the judgment was obtained without due process of law in that there was no service on, or notice to, the defendants in any form.

The attachment was granted and property attached June 29, 1917, and at the same time the attachment papers were served on the defendants' debtor only. The recital in the findings and order for the entry of judgment of the justice, which were signed July 16,

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1917, shows that an inquest was taken and judgment was entered on that day. On July seventeenth the attached property was levied on by the marshal under an execution and the attached account paid by the defendants' debtor to the marshal who, on the same day, returned the execution satisfied.

On July 20, 1917, defendants served notice of motion to vacate the attachment and judgment. The service of the papers on the defendants' debtor was made under the last clause of the 1st paragraph of section 48 of the Municipal Court Code. The certificate of service, found at page 10a of the record, shows such service and says that it was made "for the reason that said defendants have no residence and cannot be found in said city" (New York). This method of service seems to be within the strict letter of the Municipal Court Code, but in my opinion that section is unconstitutional, in so far as it does not provide for notice to the defendant, but permits judgment to be entered against a non-resident upon the mere service of process upon a person in whose possession his property is found, as it does not comply with the "due process" clause of the Fourteenth Amendment to the Constitution of the United States and section 6 of article 1 of the Constitution of the state of New York. In *Martin* v. *Central Vermont R. R. Co.*, 50 Hun, 347, the court said, at page 350, in condemning a similar Vermont statute: "It seems hardly necessary to argue that a judgment which deprives a man of his property cannot lawfully be recovered without notice to him. We do not mean that against absent debtors the law may not authorize an attachment of the alleged debtor's property. It may thereby acquire jurisdiction of the thing; but in order to make that jurisdiction perfect it must give due notice to the owner before it attempts to divest his title. The attachment of the

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property is only one step; another and equally important step is the notice to the owner. (Cooley on Constitutional Limitations, 403; *Buchanan* v. *Rucker*, 9 East, 192; *Fenton* v. *Garlick*, 8 Johns. 194.) Such is the rule in proceedings strictly *in rem*, to which what is known as foreign attachment is analogous. Now, while it is true that this notice to the owner need not be personal, as he is out of the State, yet it must be, as said in the quotation above, 'adapted to the nature of the case.' If it be said that it rests with the legislature of the State in which the attachment is issued to declare what shall be a sufficient notice, the answer is that that may be so, provided there is a reasonable and *bona fide* provision for giving notice. But certainly a legislature cannot enact that no notice need be given, or make that a notice which is no notice at all. To do that would be a fraud on the Constitution.

"Now, in the present case, there was no notice whatever to Martin and no attempt to give him notice. *Process was issued and served on the railroad company, his debtor, and on no one else. To serve a notice on a man's debtor is no notice to the man of a claim against him.* The debtor is in no sense his agent. And, if there were a statute of Vermont declaring it to be unnecessary to give any notice to the alleged debtor whose property is to be taken, such a statute could not be valid against this constitutional provision. A State cannot make that due process of law which is not such. If a State can declare that service on a man's debtor is due process of law under which his property can be taken away, then it can dispense with any service of any kind whatever. The constitutional amendment aims, among other things, to guard all the citizens of all the States from any such injustice."

In *People ex rel. Simpson Co.* v. *Kempner*, 154 App.

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Div. 674, the court said, page 677: "So carefully have the courts guarded this constitutional and sacred right of the citizen, that statutes omitting this required essential have uniformly been condemned, even where it appeared, as it does in this case, that the party proceeded against was permitted, through the courtesy of the court, to have and did have notice of the proceeding and opportunity to be heard. It is not enough that a person may by chance have notice, or that he may as a matter of favor or courtesy have a hearing; the law itself to be constitutional *must require notice* and give a right to a hearing. It matters not upon the question of the constitutionality of such law that the questions involved have been fairly decided. The essential validity of the law is to be tested, not by what has been done under it, but by what may by its authority be done. (*Stuart* v. *Palmer,* 74 N. Y. 183, 188; *Gilman* v. *Tucker,* 128 id. 190, 200; *Coxe* v. *State,* 144 id. 396, 408; *Colon* v. *Lisk,* 153 id. 188, 194.)" See also *Windsor* v. *McVeigh,* 93 U. S. 274; *Roller* v. *Holly,* 176 id. 398. In the *Roller* case the court said, p. 409: "That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of law to which no citation of authority would be additional weight."

Undoubtedly personal service on a non-resident defendant is not essential, and constructive notice is sufficient if "it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend." *Happy* v. *Mosher,* 48 N. Y. 313, 317. But, in my opinion, service on a resident debtor of a non-resident defendant is not sufficient. *Martin* v. *Central Vermont R. R. Co., supra; King Tonopah Mining Co.* v. *Lynch,* 232 Fed. Repr. 485. In the latter case the court held that a statute permitting service of process

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upon a foreign corporation by delivering it to the secretary of state was not "due process," and said, page 498: "The statute provides a form of service by which it is quite possible for a plaintiff, who is familiar with the business and affairs of the defendant, and consequently knows where the defendant may be served personally or by mail, to obtain a judgment without defendant's knowledge. If the statute were not so designed, if it were not the purpose to subtract something from the full measure of constitutional due process, why was not the secretary of state required to make some attempt to give notice, particularly when the plaintiff is fully informed as to defendant's residence and whereabouts?"

In the case at bar plaintiff knew defendants' home address and also knew the address of defendants' representative in New York city, but so far as the record shows both he and their debtor carefully refrained from giving them any notice of the attachment. Plaintiff had obtained a judgment against defendants and the satisfaction of that judgment without their knowledge and evidently with the intention of keeping them in ignorance of it until he had secured their money. This shows clearly the dangerous possibilities of the statute.

The respondent argues that the defendants are protected by the provisions of sections 55 and 135 of the Municipal Court Code, but it is clear that they do not meet the point. They merely provide that, where there has been an attachment and the defendant is not served personally and does not appear, the plaintiff cannot obtain a judgment *in personam* but only a judgment *quasi in rem* against the attached property; and that if he desires a judgment *in personam,* the judgment which he has already obtained in the attachment suit will be merely presumptive evidence of the validity of

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his claim in the second action which he brings to obtain a personal judgment. However, the judgment which he has already obtained in the attachment suit is absolutely conclusive against the attached property. There is nothing in the Municipal Court Code which provides otherwise. Section 55 provides a rule of evidence in a suit *subsequently brought,* but has no effect whatsoever on the conclusiveness of the judgment in the attachment suit against the property actually attached.

The judgment should therefore have been vacated, and as it is and always has been null and void there is no force in respondent's point that the defendants cannot move to vacate the attachment, because section 54 of the Municipal Court Code and section 682 of the Code of Civil Procedure only permit applications to vacate attachments before the actual application of the attached property or the proceeds thereof to the payment of the judgment recovered in the action. It would be absurd to hold that the judgment is void because entered without due process of law, and yet that defendant is prevented by the entry of that judgment and the unlawful application of his property to the payment thereof from moving to vacate the attachment promptly upon his discovery of its existence. The provision that the motion to vacate the attachment and warrant must be made before the application of the proceeds presupposes a valid notice to the defendants of the pendency of the proceedings. If interpreted as the respondent in the instant case would have us apply it, its infirmity as unconstitutional is quite as clear as that of the provision for the service of the summons.

The warrant of attachment was improperly granted and should be vacated because the papers on which it was granted fail to show facts supporting the allegation of the complaint that plaintiff was ready to receive

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and pay for the goods. His allegation of that ultimate fact in his complaint is probably sufficient, so far as the complaint is concerned, but it was necessary that his affidavits should contain evidence from which the court can determine that that ultimate fact can be substantiated. *Makepeace* v. *Dilltown Smokeless Coal Co.*, 179 App. Div. 60. In addition to this, the plaintiff's affidavit states that "said defendants are justly indebted unto this plaintiff in the sum of $420 over and above all payments, set-offs or counterclaims which the defendants have against this plaintiff *as near as they are known to deponent,*" which is an insufficient compliance with section 40 of the Municipal Court Code and section 636 of the Code of Civil Procedure. It is hard to say just what plaintiff means by the words "as near as they are known to deponent," but it is clear that he is, to say the least, somewhat uncertain about a matter as to which the Code requires him to be positive.

Order reversed, with ten dollars costs, and judgment and warrant of attachment vacated and set aside, with ten dollars costs, with leave to the plaintiff to appeal to the Appellate Division, First Department.

BIJUR and PHILBIN, JJ., concur.

Order reversed, with costs, and judgment and warrant of attachment vacated, with costs, with leave to plaintiff to appeal to Appellate Division.

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EDWARD J. FARRELL, Appellant, v. FRANCES JUDGE WOODWARD, Respondent.

(Supreme Court, Appellate Term, First Department, November, 1917.)

Landlord and tenant — lease — action for rent — trial — judgments — appeal.

Where a landlord prior to the termination of a written lease notified the tenant that if she did not sign a new lease embodying proposed new terms she would not be allowed to hold over except upon the understanding that such holding over would be upon the new terms, the action of the tenant in holding over notwithstanding her oral objections to the new terms is, as matter of law, an acceptance of the landlord's proposition resulting in a renewal of the lease upon the new terms, and in an action for rent judgment for the dismissal of the complaint on the ground that no new lease had been established will be reversed and a new trial granted.

APPEAL by plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, second district, dismissing the complaint at the close of the plaintiff's case.

Edwards, O'Loughlin & George (Gerald S. O'Loughlin, of counsel), for appellant.

Gwinn & Deming (W. H. Dannat Pell, of counsel), for respondent.

BIJUR, J. This action was brought by the plaintiff, as landlord, to recover from the defendant, as tenant, the rent of a house for the months of February, March and April, 1917. The claim has arisen upon the following state of facts:

Plaintiff rented this property to defendant upon a

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written lease made in 1915 for the term of one year beginning May first of that year at a rental of $175 monthly, payable on the first day of each month. The 9th paragraph of the lease reads as follows:

"*Ninth.* And it is further agreed between the parties hereto that the party of the second part has made examination of the buildings and premises and leases the same in their condition as found at the time of making this lease with the understanding that the said party of the second part will be allowed the rental of the months of February and March, 1916, for doing at her own expense such decorating of rooms, etc., and such shelving in the butler's pantry and kitchen as considered necessary by her during the term of this lease. And also it is understood and agreed that party of the second part shall be allowed the rental of the month of April, 1916, in consideration of caring for said premises and doing at her own expense all repairs that may become necessary to the interior and exterior of the buildings and premises during the term of this lease."

On March 16, 1916, plaintiff sent to defendant the following letter:

"MRS. FRANCES JUDGE WOODWARD,
"302 Sanford Ave.,
"Flushing, New York:

"DEAR MADAM.—From a letter received from Runge & Co., the 11th inst., I understand that you desire to remain another year, as a tenant of premises No. 302 Sanford Ave. I will say that I am willing to extend the present lease for one year, with the understanding that you will make all necessary repairs, during the term at your own expense.

"In connection therewith I will have the metal roof of house examined and if I find it needs repair or

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repainting, I will have same done before the commencement of the term.

"If this is satisfactory to you and you decide to take the premises for another year, we can make the necessary endorsement on the present lease.

"Respectfully,

"(Signed) E. J. FARRELL."

This letter was delivered to defendant by Mr. Runge (a member of Runge & Co., therein referred to), who was the agent of the plaintiff and who had negotiated the original lease with defendant. Runge testified that when he delivered this letter, defendant told him that she "wouldn't sign such a lease." Subsequently he delivered to her a letter of April 27, 1916, reading as follows:

"MRS. FRANCES JUDGE WOODWARD,

"302 Sanford Ave.,

"Flushing, N. Y.:

"DEAR MADAM.—Not having heard from you in reply to my letter of March 16th I take it you are going to remain and occupy the premises, No. 302 Sanford Ave., for another year in accordance with that letter, that is: under the present lease with the understanding that all interior and exterior repairs, etc., are to be done by you at your own expense.

"As I mentioned before it might be well to make an endorsement to this effect on the present lease, but of course if you do not care to do this it will be satisfactory to me, as you will understand that after May the First you will remain as a holdover lessee for another year under the above conditions.

"I write you now so that there will be no misunderstanding between us later.

"Respectfully yours,

"(Signed) E. J. FARRELL."

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He testified that she then said after reading the letter: "That doesn't need any answer." Thereupon defendant continued to occupy the premises paying the monthly rental reserved in the lease until February, 1917. She has refused to pay the rental for February, March and April on the claim that the lease having been renewed upon its precise terms she was not required to pay rental for those months — referring, of course, to the provisions of paragraph 9 of the lease of 1915.

The learned judge below, upon the appearance of these facts, was of opinion that "no new lease had been established between the parties," and therefore dismissed the complaint. In this conclusion I cannot concur. Had defendant merely held over without any exchange of communications between herself and plaintiff, the old lease would thereupon, at the option of plaintiff, have become renewed. *Kennedy* v. *City of New York*, 196 N. Y. 19. Even in that event, I think it would be, to say the least, exceedingly doubtful whether the implied renewal would extend so literally the terms of the previous lease as to require the conclusion that defendant was not to pay rent for the months of February and March, 1917. It is evident that the first clause of paragraph 9 was intended to award to defendant free rent for those two months in consideration of her making such repairs or improvements in the premises as would make them more available to her in certain matters of convenience and taste. I think it may fairly be inferred, if it does not indeed clearly appear, that these were not alterations in the nature of general repairs or of work that could reasonably be expected to be required annually, but rather in the nature of a particular and peculiar improvement to be made once to meet the wishes of a prospective tenant. The very nature of the improvement then

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would preclude us from inferring that it was to be repeated, and consequently from holding that a renewal of the lease renewed those terms of it. This is not true, however, of the 2d clause of the 9th paragraph which allowed the rental of the month of April in consideration of the defendant's making general repairs "necessary to the premises during the term of this lease." It is possible to present a persuasive argument that that clause was renewed by a renewal of the lease.

Defendant-respondent contends also, among other things, that plaintiff's letters of March and April, 1916, did not other than renew the lease, literally emphasizing as it were the provisions of article 9 in so far as plaintiff's letters repeat "that all interior and exterior repairs are to be done by you *at your own expense.*" The use of this phrase may have been unfortunate, because of its similarity to the language of the 9th clause of the lease, but, as I read the letters, they were a plain intimation by the plaintiff that if defendant elect to remain another year she might do so with the understanding that any repairs to be made must be at her own *net* expense, that is, without reimbursement by way of allowance for rent. That is the common sense interpretation of the language under the circumstances disclosed. While it is true that the 9th clause of the lease also provides that the repairs were to be done at defendant's "own expense," this is coupled in the same clause with the provision that she is to receive a special allowance to compensate her therefor. The words in the lease "at her own expense" were ill chosen, but the meaning there is perfectly clear because the phraseology employed is elaborated by the provision for an allowance. Unless the plaintiff had intended to change the terms of the lease in respect of the liability for the cost of the

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repairs, his reference to the subject in his two letters would have been both superfluous and meaningless. Since in the letters he provided that the repairs were to be done at defendant's own expense without qualification and without any suggestion of any allowance therefor, it seems to me that we must conclude that the meaning plainly intended was that defendant should pay for the repairs without receiving the reciprocal allowance or compensation originally provided for. Defendant has shown that that was her understanding by the testimony which her own counsel brought out on cross-examination of plaintiff's witness Runge, *i. e.*, that, in answer to his proposition, she said that she "refused to sign such a lease," that is, to accept the proposition although she was always ready to renew the lease on the original terms. She, therefore, clearly understood that plaintiff was proposing a renewal upon terms different from the old lease in respect of any allowance to her for the cost of repairs.

Were a question of fact involved in the decision of this case, I think that there might be serious doubt as to the precise meaning of defendant's answer (similarly testified to by Runge on cross-examination) to plaintiff's second letter, namely, the one of April 27, 1916. In this letter, after proposing the change in the terms of the lease to which I have alluded, the plaintiff repeats that it might be well to indorse a memorandum to that effect on the lease, but that if the defendant did not care to do this, "It will be satisfactory to me, as you will understand that after May 1st you will remain as a hold-over lessee for another year under the above conditions." To this defendant replied, as Runge testified, "that doesn't need any answer." Taken literally this reply is quite as consistent with the interpretation that it was an acquiescence in plaintiff's dual proposal that the lease be changed, and that

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defendant need not take any action thereon beyond holding over, as it is with the idea of a rejection of the proposition. But on a reading of this testimony in connection with her previous refusal to sign a lease embodying these terms its fair construction would be that of a continued refusal to the same effect. Assuming then that the plaintiff, prior to the termination of the lease, had notified the defendant that if she did not sign a new lease embodying his proposed new terms she would not be allowed to hold over except upon the understanding that such holding over would be upon the new terms, we are brought to a consideration of the legal effect of her holding over notwithstanding her oral objections to the terms. I have no doubt that the result of her action must be interpreted as matter of law as an acceptance of the landlord's proposition, and a renewal of the lease on the terms proposed by him. Such, as I read it, is the plain import of the cases. And although it is true that in some cases, as for example, *Scully* v. *Roche,* 76 Misc. Rep. 458, the tenant at first actually complied with the changed terms, namely, paid a month's rental at the proposed increased rate, that is merely a circumstance and not a distinguishing feature. In other cases, like *Despard* v. *Walbridge,* 15 N. Y. 374, the tenant made no reply to the landlord's communication, but merely held over. I do not think that this difference in circumstances is material. The landlord, as owner, has, upon the termination of a lease, the sole right of possession of the premises, and he alone has the consequent right to prescribe the terms upon which either a new or a continued occupancy thereof shall be enjoyed. His proposition of terms may be rejected, and, if the proposed tenant be then in occupancy, possession may be by him surrendered. But if he elect to remain, the mere fact that he, by word of mouth, undertakes to reject or

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change the landlord's terms cannot alter the facts and the underlying rights. His continuance of occupation must be deemed more eloquent than his words, and as implying acquiescence in the landlord's proposal. This has been expressed by Earl J., in *Schuyler* v. *Smith*, 51 N. Y. 309, 315, as follows: "The safe and just rule I believe to be the one established by authority, that a tenant holds over the term at his peril; and the owner of the premises may treat him as a trespasser or as a tenant for another year upon the terms of the prior lease, so far as applicable. If the argument of appellants' counsel, as to mutuality and consent of both parties, is sound, then the tenant may hold over an entire year, and give notice at its commencement that he will not pay as much rent as stipulated in the prior lease, or that he will not perform some other covenant contained in the same, and then claim, at the end of the year, that he was not liable to pay the rent, or bound by the covenant, because he did not assent, and, thus, that the mind of the parties did not meet. In such case, no matter what objection the tenant made, so long as the landlord did not consent to new terms, he would be bound by the terms of the prior lease."

The case is analogous, it seems to me, to those in which the use of a check sent under appropriate circumstances by the maker as an accord and satisfaction is held to effect that result regardless of any unilateral reservation made by the recipient *without affording to the maker the opportunity to withdraw the check before its use.*

An interesting case in this connection in *Laroe* v. *Sugar Loaf Ref. Co.*, 180 N. Y. 367, wherein the sending and use of such a check was held not to constitute an accord because *prior to its having been made and forwarded* the future recipient had notified the maker

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that any check sent by him, whether pretending to be "in full" or otherwise, would be treated merely as a payment on account.

Had the defendant, in the instant case, in response to the landlord's proposition, vacated the premises and then notified him before resuming possession that if he permitted her to re-enter she would consider the lease renewed upon precisely the old terms, the situation would accord with that presented in the *Laroe* case, and might, to my mind, involve the holding for which she now contends, but which I think is unsound under the circumstances here disclosed.

PHILBIN and ORDWAY, JJ., concur.

Judgment reversed, new trial granted, with thirty dollars costs to appellant to abide event.

GEORGE A. CRUMP, Plaintiff, *v.* ANNIE MANGAN, JOHN F. FITZPATRICK, MARGARET REILLY, EDWARD BECK, JENNIE BECK, MARY BECK, KATIE BECK and EDWARD BECK, JR., Defendants.

(Supreme Court, Bronx Special Term, November, 1917.)

Contracts — execution of — provisions of — for sale of real property — deeds — liens.

By a written contract for the sale of certain real property, plaintiff, the intending purchaser, agreed to pay the purchase price, $2,000, as follows: $100 in cash to the parties of the first part or the survivor of them and $15 on the first day of each and every month during their lives and at their death continue said payment to their heirs until the principal sum had been paid in full; and it was mutually agreed that at the death of the parties of the first part plaintiff should have the privilege of paying off

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at once the balance then due upon the purchase price. The contract also provided that, in consideration of the privilege to the parties of the first part of occupying a certain part of the premises rent free during their lifetime, no interest should be charged on the unpaid balance of the purchase price. Synchronously with the execution of the contract the parties of the first part thereto executed and delivered to plaintiff a full covenant deed of said premises which contained a clause to the effect that the premises conveyed were free from incumbrances excepting certain conditions and obligations contained in the contract of sale between the parties to the deed of conveyance, both of which instruments were duly recorded in the proper county clerk's office. One of the parties of the first part to the contract of sale died within a year of the execution thereof and the other party died about seven years later. The cash payment was made and the payments of $15 per month were duly made until the death of the survivor of said parties of the first part when there remained unpaid on the purchase price the sum of $535, which amount, in an action to have the contract of sale canceled and discharged of record as a lien and incumbrance on the premises in question, plaintiff offered to pay into court. *Held,* that the contract of sale constituted a vendor's lien for the purchase price and was recorded for the purpose of giving notice thereof; that it was an incumbrance on plaintiff's title and upon full payment of the purchase price it should be canceled and discharged of record.

That in the provision of the contract that at the death of the parties of the first part the monthly payments should be paid to their heirs until the principal sum had been paid in full the word "heirs" should not be given its strict legal definition and that the balance due upon the purchase price at the death of the parties of the first part to the contract should be divided between their next of kin at the time of the death of the survivor of said first parties.

ACTION by plaintiff to secure a decree directing that a certain contract in writing be canceled and discharged of record as a lien and incumbrance on real property.

Lawrence N. Martin, for plaintiff.

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Peter P. Smith, for Annie Mangan and five defendants named Beck.

Charles H. Harris, for Margaret Reilly.

Clark & Eadie, for John F. Fitzpatrick.

MULLAN, J. This action is brought by the plaintiff to secure a decree directing that a certain contract in writing be canceled and discharged of record as a lien and incumbrance on plaintiff's real property and to determine the rights of the various defendants in and to the sum of money due by the plaintiff under that contract. At the trial all of the defendants who appeared and answered agreed upon a written stipulation of the facts, from which it appears that on March 3, 1906, the plaintiff entered into a contract in writing with Catharine Keenen and James Keenen, her husband, whereby they agreed to sell, and the plaintiff agreed to purchase, a certain lot of land with the house thereon erected, situate in what is now Bronx county. The purchase price therein stated was $2,000, to be paid by plaintiff as follows: "One hundred dollars in cash to the parties of the first part (Catharine and James Keenen), or the survivor of them, and fifteen dollars on the first day of each and every month during the terms of their natural lives, and at their death continue the said payment to their heirs, until the whole sum of two thousand dollars shall have been paid off; and it is mutually agreed between the parties hereto that at the death of the parties of the first part the party of the second part (the plaintiff) shall have the privilege of paying off at once the balance then due." The contract also contains a provision that there shall be no interest charged on the unpaid balance of the purchase price in consideration of the par-

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ties of the first part (Catharine and James Keenan) having the privilege of occupying the first floor of the house, rent free, during their lifetime. On the same day the Keenens executed and delivered to the plaintiff a full covenant warranty deed of the premises. The deed is in the usual form except that it contains the following clause: "That the said premises are free from incumbrances excepting certain conditions and obligations contained in a certain contract between the parties hereto, and which contract is simultaneously recorded herewith and binding on the parties hereto." The deed and contract were both recorded on the 15th day of March, 1906, in the office of the register of the county of New York, the then proper office. James Keenen died in January, 1907; Catharine died on January 14, 1913. The $100 payment was made and payments of $15 per month were duly made as provided in the contract until the death of Catharine Keenen, when there remained unpaid the sum of $535, the balance of the $2,000 purchase price. The plaintiff offered to pay into court this sum of $535. The questions are: (1) Is the plaintiff entitled to a judgment canceling as paid and discharging of record the said contract? (2) Is the plaintiff chargeable with interest on the unpaid balance of the $2,000 from the death of Catharine Keenen to date? (3) Who are entitled to receive the unpaid balance of the purchase price, and in what proportions? I think that under the holding in *Zeiser* v. *Cohn,* 207 N. Y. 407, the contract may be deemed to constitute a vendor's lien for the purchase price, reduced to writing and recorded for the purpose of giving notice thereof; that it is an incumbrance on the plaintiff's title, and that after it is fully paid and discharged it should be canceled of record. I do not think the plaintiff is chargeable with interest on the unpaid balance. The contract

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expressly provides that no interest shall be charged. After the death of Catharine the plaintiff ceased paying the monthly installments. He asserts that he was unable to ascertain to whom to pay it, but that he was at all times ready, able and willing to pay the balance due under his contract. While it is the general rule that a debtor must seek out his creditor and make a tender in order to prevent the running of interest after a breach of his contract to pay a liquidated amount, still I do not think the plaintiff's failure to pay, in the circumstances here present, constitutes such a breach. In equity a breach will not be enforced where the debtor was ready, willing and able to pay and has made every reasonable effort to find the creditor to make a tender. *Schieck* v. *Donohue,* 92 App. Div. 330; *Hale* v. *Patton,* 60 N. Y. 233. The question, however, remains, Who is entitled to receive the balance remaining to be paid by the plaintiff under his contract? The contract provides that at the death of Catharine and James Keenen the balance shall be paid to "their heirs." I do not think this means the heirs of the survivor. While it is clear that during their lives the husband and wife should receive the payments equally, and upon the death of one the survivor should receive the entire payments, still there is nothing to indicate that at the death of the survivor the heirs of one should receive the balance to the exclusion of the heirs of the other. It seems to me that it was the intention of the Keenens that, after they were both dead, whatever balance was left should go to the relatives of both accordingly as the law provides in such cases. Therefore, I do not think the word "heirs" should be given its strict legal definition. *Lawton* v. *Corlies,* 127 N. Y. 100. As the property to be distributed here is personal and not real, I think the balance remaining unpaid should be divided between the next of kin of

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James Keenen and the next of kin of Catharine Keenen. In determining who are the next of kin entitled to share in the balance due from the plaintiff it is necessary to ascertain who were the next of kin of James and Catharine Keenen at the time of the death of Catharine. Where there is a provision to pay and divide among a class, only those members of the class at the date fixed for the payment take and their interests do not vest until then. *Geisse* v. *Bunce,* 23 App. Div. 289. There is, however, no proper proof before me that the defendants are the next of kin of James and Catharine Keenen, or their only next of kin. The stipulation entered into by the counsel for the plaintiff and the counsel for some of the defendants cannot be considered as such proof. The court must be satisfied by some evidence that all the proper parties are before the court so that their respective interests may be ascertained before it can order the discharge and cancellation of record of the instrument in question. *Winterson* v. *Wilson,* 40 N. Y. Supp. 961. No sworn testimony as to pedigree was offered by any party. There must be some evidence of these facts before the plaintiff will be entitled to the relief demanded in his complaint. Such proof as plaintiff desires to offer on this point may be made at a time mutually convenient to the court and to the respective parties.

Judgment accordingly.

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ANDREW DRESSEL, Plaintiff, v. JULIUS M. HANSER, Defendant.

(Supreme Court, Bronx Trial Term, November, 1917.)

Mortgages — assignment for illegal purpose — action to compel reassignment not maintainable.

Where the assignment of a bond and mortgage was for the purpose of putting them out of the reach of the plaintiff in a negligence action brought against the assignor, and about a month thereafter the assignee, who advised the making of the assignment, by an instrument in writing declares that the bond and the mortgage belong to his assignor and that he, the assignee from whom no consideration passed for the assignment, makes no claim to the bond and mortgage, the law will leave the parties where it finds them, and an action to compel the reassignment of the bond and mortgage and an accounting for interest cannot be maintained.

ACTION to procure a decree requiring reassignment of a bond and mortgage and an accounting of interest received by defendant.

F. W. Hottenroth, for plaintiff.

Lazarus E. Schlector, for defendant.

MULLAN, J. The plaintiff, owning a bond and mortgage securing $2,500, on April 9, 1915, assigned them to the defendant Hanser, and on May 13, 1915, the latter executed an instrument reading as follows:

"*Know all men by these presents,* that I, Julius M. Hanser, of the borough of the Bronx, city and state of New York, do hereby affirm and declare that the mortgage made by E. Marion Toussaint to Andrew Dressel, on the 19th day of November, 1914, and assigned by

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him to the said Julius M. Hanser on the 9th day of April, 1915, is to belong to the said Andrew Dressel, and that the said Julius M. Hanser makes no claim to the same of any kind.

"In witness whereof I have hereunto set my hand and seal this 13th day of May, 1915.

[L. S.] "JULIUS M. HANSER."

The defendant subsequently refused to reassign the bond and mortgage to the plaintiff, who thereupon brought this action to procure a decree requiring reassignment and an accounting of interest received by the defendant, with incidental injunctive relief. It appeared upon the trial that no consideration passed from the defendant, the plaintiff admitting that he had made the transfer in order to put the bond and mortgage out of reach of a plaintiff in an action that had been brought against him, the plaintiff here, for negligence. The plaintiff is a milk dealer, and the defendant appears to have been engaged in a small and casual way in the real estate business. The two were friends, but not intimates, the plaintiff himself denying that they were "close friends," and there is no proof, nor is there any probability from what has been proved, that there was any relationship between them of special confidence or trust. According to the plaintiff, the defendant advised the making of the assignment, and, as the defendant offered no proofs but rested on the plaintiff's case, the plaintiff's testimony in that regard is entitled to credence. That actual trust was reposed in the defendant by the plaintiff perhaps goes without saying, else the plaintiff would not have made the transfer to him. But that is the trust of mere friendship, and far from that of fiduciary relationship, as, for example, that existing in the case of *Ingersoll* v. *Weld*, 103 App. Div. 554. As was said by Talcott, J., in *Renfrew* v.

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McDonald, 11 Hun, 254, 256: "The case presented by the complaint is a bald case of a conveyance of the property in question, with an express intent to hinder, delay, and defraud the creditors of the plaintiff. The allegation that confidential relations existed between the parties; that the defendant was the adviser of the plaintiff in the transaction, and was sometimes a boarder at the defendant's house, are allegations of a character that might truly be made, in most cases, of such conveyances. It is not unusual, we suppose, that confidential relations, growing out, not of any legal relation or employment, but of mere personal friendship, have existed between the fraudulent grantor and his grantee." There is a suggestion, insinuated into the case upon the basis of testimony to which I shall later advert, that the principle of *Ingersoll* v. *Weld, supra,* or that of *Ford* v. *Harrington,* 16 N. Y. 285, might govern here; but for the sake of clarity I shall postpone detailed reference to the evidence in question until I have discussed the authorities. For the moment, therefore, I shall treat the situation we are dealing with as one unaffected by the important consideration met with in the *Ford* and *Ingersoll* cases, and the cases following them, and assume that here we have to do with the simple question whether, when parties plan and consummate a conveyance from one to the other in order to make the grantor proof against a threatened judgment, and the guilty grantee adds to his share in the initial fraud a refusal to return to its former owner the subject-matter of the conspiracy, his refusal furnishes ground for recourse against him. It is clear from the cases that the answer is not to be affected by any feeling of contempt that the conduct of such a defendant is so obviously calculated to inspire. In *Holman* v. *Johnson,* 1 Cowp. 341, Lord Mansfield said: "'The objection that a contract is immoral or illegal

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as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to real justice as between him and the plaintiff; by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa,* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally at fault, *potior est conditio defendentis.*' " The law upon the subject was settled in this state in *Nellis* v. *Clark,* 20 Wend. 24; affd. by the Court of Errors in 4 Hill, 424, and approved and followed by the Court of Appeals in *Moseley* v. *Moseley,* 15 N. Y. 334. There the action was at law upon a note, and the defendant offered to prove that a certain conveyance of land to the defendant, for which the notes were given as part payment, was made in pursuance of a fraudulent scheme between the grantor and the grantee to put the property out of reach of one Otis who had, shortly prior to the conveyance, brought a slander action against the grantor. The exhaustive opinion written by the eminent judge who wrote the majority opinion, Mr. Justice Cowen, leaves little to be said upon the law of the subject as it had been expounded up to that time. He shows with

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characteristic evidence of deep research that both at law and in equity, and as well under the principles of the common law prior to the enactment of the Statute of Frauds as thereafter, no aid in any form will be extended by the courts to a participant in a fraudulent device or conspiracy. "As," he says at page 32, "the law finds them (the defrauding grantor and grantee) so it will leave them. They derive that kind of negative assistance which arises from their cases being mutually such that the law will not tarnish its hands by rescuing them from the mire." Leonard, J., in *Sharp* v. *Wright*, 35 Barb. 236, 238, puts it thus: "It does not help the plaintiff's case that the defendants failed to observe the rule of 'honor among thieves.' The plaintiff cannot insist that he has been made a victim because the defendants disregarded that rule, and that he is exempt from the application of the legal maxim '*potior est conditio defendentis.*'" In the same case Clerke, P. J., said: "The parties were clearly *in pari delicto*. * * * Whenever they have fraudulently or illegally contracted to do anything, it (the law) refuses to enforce the execution or to award damages for the non-execution of such contract. * * * Whatever they have executed, it refuses to lend its aid to either party to disturb." In *Daimouth* v. *Bennett*, 15 Barb. 541, which was an action to recover back money paid to compound a felony, Crippen, P. J., said (p. 545): "In such a case the courts treat both parties as having trodden upon forbidden ground, equally in the wrong, and as being unworthy alike to ask for or receive their aid." In *Dent* v. *Ferguson*, 132 U. S. 50, Mr. Justice Lamar (at p. 66) quotes from the opinion of the district judge: "One of the objects of the bill is to prevent the defendants from reaping the lion's share of the benefits of this confessed fraud, and the maxim *in pari delicto*

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potior est conditio defendentis has no application to a case like this," and characterizes that statement as follows: "From his view we dissent. We find no authority for the idea that it is the province of a court of equity to make a fraudulent debtor the special object of its favor because he has not received a large enough consideration for his 'confessed fraud.' That court is not a divider of the inheritance of iniquity between the respective heirs of two confederates in fraud." When *Nellis* v. *Clark* was up on appeal at the Court of Errors (4 Hill, 424), Chancellor Walworth said (p. 426): "Where both parties are equally offenders against the positive laws of the country, or the general principles of public policy, or the laws of decency or morality, *potior est conditio defendentis;* not because the defendant is more favored where both are equally criminal, but because the plaintiff is not permitted to approach the altar of justice with unclean hands. The exceptions to this rule are some few cases where the law which creates the illegality in the transaction was intended to restrain the one party and to protect the other; as in the case of extortion by public officers in receiving illegal fees, contracts by lenders of money upon which usurious interest has been paid, etc. * * * A sale or assignment for the purpose of delaying, hindering or defrauding a creditor in the collection of his debt, was illegal at the common law, and is in itself immoral and against public policy. And the statutes declaring such transactions void as against creditors, are only in affirmance of the common law on that subject. * * * It makes no difference, in the case of a suit upon an executory contract, whether the proof to establish the fraudulent or illegal nature of the transaction comes out from the examination of the plaintiff's witnesses or is introduced by the defendant, who was himself a party to the fraud." That the doc-

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trine *ex turpi causa* (or *ex dolo malo*, as it is sometimes phrased) *non oritur actio* bars a decree in favor of the plaintiff here is, I think, clearly shown by the cases already cited and the following authorities: *Bolt* v. *Rogers*, 3 Paige, 154; *Davenport* v. *City Bank of Buffalo*, 9 id. 12; *Wheeler* v. *Wheeler*, 5 Lans. 355; *Sweet* v. *Tinslar*, 52 Barb. 271; *Stewart* v. *Ackley*, Id. 283; *St. John* v. *Benedict*, 6 Johns. Ch. 111; *Mapes* v. *Snyder*, 2 T. & C. 318; *Saratoga County Bank* v. *King*, 44 N. Y. 87; *Knowlton* v. *Congress & Empire Spring Co.*, 57 id. 518; *Materne* v. *Horwitz*, 101 id. 469; *Haynes* v. *Rudd*, 102 id. 372; *Robertson* v. *Sayre*, 134 id. 97; *Bartle* v. *Coleman*, 29 U. S. (4 Pet.) 184; *Wheeler* v. *Sage*, 68 U. S. (1 Wall.) 518; *Randall* v. *Howard*, 67 U. S. (2 Black) 585; *Farrar* v. *Bernheim*, 74 Fed. Repr. 436; 75 Id. 136; *Schermerhorn* v. *De Chambrun*, 64 id. 195; *Baldwin* v. *Cawthorne*, 19 Ves. 166; *Ruckman* v. *Conover*, 37 N. J. Eq. 583; *Winans* v. *Graves*, 43 id. 263; *Tyler* v. *Tyler*, 126 Ill. 525; *Powell* v. *Ivey*, 88 N. C. 256; *Walton* v. *Tusten*, 49 Misc. Rep. 569; Wait Fraud. Conv. (3d ed.) §§ 395–401; Bispham Principles of Eq. (9th ed.) § 248; Fry Spec. Perf. (4th ed.) § 480; 9 Cyc. 546; 16 id. 145; 20 id. 617. This rule of law seems to be one of universal application in courts both of law and equity throughout this country and in England, with the single exception that in Massachusetts it is otherwise in courts of law. In *Harvey* v. *Varney*, 98 Mass. 118, which was an action upon a contract made by both parties with intent to defraud, the court expressly refused to follow the decision in *Nellis* v. *Clark*, 20 Wend. *supra*, upon the ground (p. 123) that "to apply to this case the maxim, *in pari delicto potior est conditio defendentis* would be to exercise rigor beyond the limits of wholesome severity." To the same effect is the holding in *Carll* v. *Emery*, 148 Mass. 32, also at law. But even in Massachusetts the rule is

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otherwise in equity. *Canton* v. *Dorchester,* 62 Mass. (8 Cush.) 525. And see implication to that effect in the opinion in *Harvey* v. *Varney.* In many of the cases mentioned the acts and conduct in question were not such as could be stigmatized as immoral, but, as in *Saratoga County Bank* v. *King,* 44 N. Y. *supra,* they were merely technically illegal, and there Leonard, J., after stating that there was no offense against the moral law, observed (p. 94) that: "The inflexible rule is, that no remedy can be had in a court of justice on an illegal contract or transaction, where both parties are *in pari delicto.*" And in equity the clean-hands maxim would apply were there no maxim *ex turpi causa* to make it unnecessary to resort to that salutary doctrine that permeates all equity jurisprudence. While no contention has been made by counsel for the plaintiff that there is any less a *delictum* on the part of the parties to the transaction here called into question, for the reason that the negligence action against the plaintiff had not come to trial, and that, therefore, there was no certainty at the time of the transfer that there would be any necessity for making the transfer in order to put the mortgage out of the reach of the plaintiff in case he should recover judgment, such an argument would be without force, as in many of the cases referred to that was the precise situation of the grantor. In some of the cases mention is made of the fact that there was, as it later turned out, little real occasion to fear a judgment; and there is reference in other cases to the fact that judgment actually was recovered later against the grantor; but clearly, I think, although courts have seen fit to touch upon those details in passing, it must be the presence or absence of fraudulent *intent* that makes the transfers illegal or legal, and not the correctness or incorrectness of the

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grantor's guess upon the result of the action he finds himself called upon to defend. Nor can there be any question, upon principle, that the taint of illegality, if there be such, affects not only the original assignment here in question, but that the instrument of May 13, 1915, is likewise tainted, as it is plain that that agreement was but a part, a confirmation in writing by the defendant, of the original agreement under which the assignment of mortgage was made; but, even if it were to be considered a new and independent promise, the taint adheres. As was said in *Barton* v. *Port Jackson & U. F. F. Road Co.*, 17 Barb. 397, 408: "Where a contract grows out of, or is connected with, an illegal act, or if it is in part connected with it, it is tainted with the illegality from which it sprung, and no recovery can be had. Every new agreement entered into for the purpose of carrying into effect any of the unexecuted provisions of a previous illegal contract is void." An examination of all the cases in this state that I have been able to find in which the courts refused to apply the *in pari delicto* doctrine leads, I think, to the conclusion that the ruling, although not put in those words, was invariably based upon a finding that there was no *delictum* at all on the part of the grantor or assignor, for the reason that either actually or by force of legal presumption the mind of the grantor was overborne as to the matter in question by the grantee. In *Ford* v. *Harrington*, 16 N. Y. 285, the defrauding grantee was the grantor's lawyer, and the decision of the majority of the court, very vigorously dissented from by two of the judges, was placed expressly upon that ground. In *Freelove* v. *Cole*, 41 Barb. 318; aff'd., no opinion, 41 N. Y. 619, the grantee, if not admitted to practice as a lawyer (the evidence leaving that point in doubt), practiced before justices of the peace, and acted as the

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grantor's lawyer and advised the making of the transfer, and the court regarded the *Ford* case as clear authority. In *Fisher* v. *Bishop,* 108 N. Y. 25, where the grantee, though apparently not admitted to practice as a lawyer, was a justice of the peace, and "largely employed by the people of the vicinity as a legal adviser and conveyancer," the court again followed the *Ford* case, and also in part based its decision upon the equity doctrine in relation to transfers without consideration between persons not dealing on equal terms, the grantor being old and feeble and having a special confidence in the defendant, who was found to have induced the transfer. In *Place* v. *Hayward,* 117 N. Y. 487, the grantee again was the grantor's lawyer, and the decision was based upon the *Ford* and *Freelove* cases; and there were also other valid grounds of distinction there from the case at bar. *Davis* v. *Graves,* 29 Barb. 480, is clearly distinguishable. There the defrauding grantee later reconveyed to the defrauding grantor, and the grantee's creditors sought to set aside the reconveyance as in fraud of them, and it was held that the moral obligation on the grantee's part to reconvey was sufficient to uphold the reconveyance. In the familiar case of *Boyd* v. *De La Montagnie,* 73 N. Y. 498, the transaction in question was a conveyance from wife to husband, and one of the findings of the trial court was that the pair intended to defraud the wife's creditors. The holding was that because of the mere relationship the wife was not on equal terms with her husband and was not therefore *in pari delicto.* Church, Ch. J., in his opinion for the court, cited *Freelove* v. *Cole.* In *Ingersoll* v. *Weld,* 103 App. Div. 554, the assignee was the trusted business agent and adviser of the female assignor, and, although it was plain that the latter was as morally guilty of fraud as the former, it was held that the case came within the doctrine of

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Boyd v. *De La Montagnie,* and that the close confidential relationship existing between the two compelled the conclusion that the transfers were not the free acts of the transferor. "The test," says the court (at p. 563), "is whether his advice operated upon her mind to the extent of controlling it in making the transfers, and the evidence upon such point was sufficient for the court to find that it did." In *Watkins* v. *Jones,* 78 Hun, 496, the grantors were an aged couple, with whom the grantee resided, and they relied upon him as their business adviser and friend, and the making of the bond and mortgage in question was induced by him. In so far as the holding was for plaintiffs, I think it was clearly justified by the holding in *Boyd* v. *De La Montagnie* and similar cases; but in so far as the opinion criticises *Renfrew* v. *McDonald,* 11 Hun, 254, and in so far as it partly bases the result upon a finding that the suit against one of the mortgagors, to avoid the possible consequences of which suit the mortgage was made, happened to be without merit, I think the reasoning is clearly wrong. In *Baker* v. *Gilman,* 52 Barb. 26, the plaintiff was the defendant's attorney, and, after obtaining judgment against the defendant for the value of legal services in defending the defendant in two slander suits, brought action, as a judgment creditor, to have set aside a deed made by the defendant to one Thurston after the commencement of the slander suits, but before their trial. The deed was for one dollar and was admittedly made for the purpose of putting the property out of the reach of the plaintiff in the slander suits. The holding was that the complaint in the equity action was properly dismissed. I think the decision was right in so far as it was based on the finding that Baker, as Gilman's attorney, knew of the deed and assented to its making, but that it was wrong in so far as it was predicated upon the reasoning that (p. 37) "It turned out that the several

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plaintiffs in those (slander) actions had no 'lawful' claim against Gilman." In *National Wall Paper Co.* v. *Hobbs,* 90 Hun, 288, the plaintiff sued to restrain the defendant from violating an agreement not to engage in business. It was held, upon the authority of a then recent case, that the contract was not in restraint of trade, and therefore that it was not illegal; but the defendant argued that the contract was the result of a corrupt conspiracy against the law and public policy of the state, and as to this Van Brunt, P. J., said for the learned General Term: "In view of the fact that the defendant retained the price which was paid for his corrupt and wicked agreement, it is difficult to see how he can claim that he should be absolved from its obligations, or how he can claim, being a party to the instrument and having received that which he considered an adequate consideration for the restraint which was put upon his volition, that such restraint should be removed and he be permitted to enjoy the fruits of what he claims to be his unlawful agreement. We do not think that the defendant is in a position to attack this contract, certainly not with its fruits in his pocket." Whether the expression quoted was mere *dictum* or otherwise, I think it was an unauthorized departure from the law laid down in *Moseley* v. *Moseley,* 15 N. Y. 334, *supra,* and the other cases in the Court of Appeals hereinbefore referred to. In *Sloan* v. *Macartney,* 58 Misc. Rep. 75, the Special Term of Erie cited with approval *Renfrew* v. *McDonald,* 11 Hun, *supra,* and numerous other cases above mentioned, but it placed its refusal to allow the guilty grantee to retain the benefit of the conveyance to her upon the ground that the mind of the grantor was impaired, and that thus the transfer was not his free act. These are the only cases I have found in which the doctrine of *Nellis* v.

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Clark may have been invoked where it was not squarely followed. Although it is beyond doubt that the courts in this state have at times hesitated to apply in its "wholesome severity" the rule laid down in *Nellis* v. *Clark,* as it was approved and formally adopted by the Court of Appeals, apparently because of an unwillingness to allow a defrauding grantee to bilk his partner in fraud, I have failed to find a case in the Court of Appeals where the rigidity of the rule was in the slightest degree relaxed. Indeed I cannot perceive how there can very well be any other rule, unless the courts are to place themselve in the position of openly countenancing and thus encouraging men to commit fraud upon their creditors. If the theory that has suggested itself to me be applied to the cases in the Court of Appeals, and generally elsewhere, I think that any doubt there might otherwise be as to whether or not the rule of *Nellis* v. *Clark* is still the law of this state must disappear, namely, that in all the cases of fraudulent transfer in which the doctrine *inter partes in pari delicto, potior est conditio defendentis* has not been applied, the refusal to do so was predicated upon the finding that there was no fraud except that of the grantee, for the reason that either in fact or by presumption the transfers were in law the acts of the grantee and not of the grantor.[1] Upon the assumption, therefore, that the doctrine of *Nellis* v. *Clark* is still firmly imbedded in the law of this state, it remains to consider whether certain testimony which seems to have crept almost accidentally into the record brings it within the exception of the *Ford* v. *Harrington* and *Freelove* v. *Cole* cases, or within the kindred exception of the *Ingersoll* v. *Weld* class of cases.[2] It developed that the plaintiff first met the defendant Hanser through a common friend, one Schaape, a butcher; that the plaintiff told Schaape that he, plaintiff, "had an accident;" that Hanser made his office with a lawyer

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named Kaufman; that plaintiff told Hanser about the accident, and Hanser said "he (Hanser) would take care of it;" that it was Hanser who advised the assignment of the bond and mortgage; that Kaufman appeared for plaintiff in the accident case, and that Hanser never told plaintiff that Kaufman advised that the assignment be made. There was no proof, either direct or from which the inference can be drawn, that it was upon Kaufman's advice that the plaintiff made the assignment, and I can see no possible room for the application of the doctrine of the *Ford* and *Freelove* cases. Nor is the situation at all analogous to that in *Ingersoll* v. *Weld, supra.* There the defendant was the paid and trusted agent and business manager of the plaintiff, to whom the latter turned over all her very considerable property, so complete was her confidence in him, and to such an extent had he control over her affairs and her judgment. Applying the test there laid down, I deem it beyond argument that the record here is wholly lacking in proof that would support a finding that Hanser's advice "operated upon" plaintiff's "mind to the extent of controlling it in making the transfers." To hold that the plaintiff's mind was replaced or so dominated by that of Hanser would not be to draw a presumption; rather would it be to create a fiction. No amount of justified detestation of the defendant can avail the plaintiff. The law was not made to help such a creature as the defendant, but it was made to protect society, and its purpose cannot be achieved without allowing a person in the defendant's situation to retain his ill gotten gains. Nor, for that matter, need any sympathy be wasted on the plaintiff. He wanted to swindle, and was swindled. The old saying, "hoist by his own petard," comes to mind. Complaint dismissed on the merits.

Judgment accordingly.

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Matter of KATHLEEN L. MCDEVITT.

(Supreme Court, Kings Special Term, November, 1917.)

Habeas corpus — when writ of, dismissed — parent and child — adoption — Domestic Relations Law, § 70.

Under section 70 of the Domestic Relations Law a habeas corpus proceeding will not lie by the mother of children legally adopted for permission to see them, and the writ will be dismissed and the children remanded to the custody of their foster parent without prejudice to any proceeding which the mother may bring on the equity side of the court for the relief sought.

HABEAS CORPUS proceedings.

Crisp, Randall & Crisp, for petitioner.

Hirsch, Newman & Reiss (Hugo Hirsch, of counsel), for respondent.

CALLAGHAN, J. This is a proceeding by way of a writ of habeas corpus by a mother for permission to see her children who have been duly adopted by the respondent. One's natural impulses are in sympathy with the petitioner's contention, but as I view the controlling authorities the relief asked here cannot be granted in a proceeding of this nature. Section 70 of the Domestic Relations Law provides for proceedings by way of habeas corpus to procure custody of children when they are unlawfully restrained by one not entitled to their custody, but it is obvious that that provision of the Domestic Relations Law does not apply to this situation. The respondent in this proceeding is entitled to the legal custody of the children and all natural rights of the parents have ceased. *Matter of MacRea,* 189 N. Y. 142. Therefore, the respondent

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would be in a position to maintain such a proceeding against the petitioner if the situation were reversed. A writ of habeas corpus is a common-law proceeding. It was under the common law "a writ in behalf of liberty, and its purpose was to deliver a prisoner from unjust imprisonment and illegal and improper restraint." *People ex rel. Pruyne* v. *Walts,* 122 N. Y. 238; *People ex rel. Keator* v. *Moss,* 6 App. Div. 414. The theory of such proceeding is, of course, that one is illegally restrained of his liberty as against one entitled to the custody. It is very true that habeas corpus may be resorted to for the purpose of determining the right of custody of children. The proceeding, however, is one of law and not in equity. When, therefore, one has the actual custody and the admitted legal right to the custody the court cannot, on habeas corpus, upon equitable principles, determine that the welfare of the child requires a temporary interference with such legal custody. It seems to me that an application for the relief here sought might be addressed to the equity side of the court, where the court would have full power, in its discretion, to do what is for the best interests of the children. That practice was followed in *Matter of Knowack,* 158 N. Y. 482; *Wilcox* v. *Wilcox,* 14 id. 576; *Matter of Tierney,* 128 App. Div. 835. And that such is the correct theory for such proceeding is strongly suggested in *Matter of Stewart,* 77 Misc. Rep. 524; *People ex rel. Keator* v. *Moss, supra.* It follows, therefore, that the writ must be dismissed and the children remanded to the custody of their foster parent, without prejudice, however, to any proceeding which the mother may bring for the relief sought herein.

Ordered accordingly.

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ROBERT C. POSKANZER, as Trustee of the Bankrupt Estate of FLORENCE IRVING REYNOLDS, Bankrupt, Plaintiff, *v.* CHARLES C. BULLOCK, JR., as Executor and Trustee under the Last Will and Testament of MATHEW H. BENDER, Late of the City and County of Albany, Deceased, and FLORENCE IRVING REYNOLDS, Defendants.

(Supreme Court, Albany Special Term, November, 1917.)

Security for costs — who required to give — bankruptcy — costs — Code Civ. Pro. § 3268 (4).

In an action by a trustee in bankruptcy to recover the share of income payable to the bankrupt by the defendant as trustee for her under a last will, the plaintiff under section 3268(4) of the Code of Civil Procedure may be required to give security for costs, if the cause of action sued on arose before plaintiff's appointment as trustee in bankruptcy.

MOTION for security for costs.

Mills & Mills, for motion.

Prior & Aufsesser, opposed.

CHESTER, J. The defendant Florence I. Reynolds by this motion seeks to require the plaintiff, as the trustee in bankruptcy of her estate, to give security for costs under subdivision 4 of section 3268 of the Code of Civil Procedure. That subdivision authorizes the defendant to require security for costs where the plaintiff was, when the action was commenced, the official assignee or official trustee of a debtor or an assignee in bankruptcy where the action is brought upon "a cause of action, arising before the assignment, the appointment of the trustee, or the adjudication in bankruptcy."

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The cause of action stated in the complaint is for moneys alleged to be payable to said defendant Reynolds on the 1st day of January, 1917, by the defendant Bullock, as trustee for her under the will of Mathew Bender, being the share of the income from the estate of said Bender which she claims she was entitled to on that date.

The plaintiff was appointed trustee in bankruptcy of her estate on April 27, 1917. Taking the allegations of the complaint as true, the defendant Reynolds could have brought an action against Bullock as her trustee under the Bender will for the recovery of those moneys at any time after January 1, 1917, and before the appointment of the plaintiff as trustee in bankruptcy. In other words, the cause of action was one arising *before* the plaintiff's appointment as trustee.

The case is therefore one covered by the provisions of the Code of Civil Procedure referred to and the defendant under the provision has the right to require the plaintiff to give security for costs.

Motion granted, without costs.

MacArthur Brothers Company and James O. Winston and Thomas S. Winston, Plaintiffs, *v.* The City of New York, Defendant.

(Supreme Court, Ulster Special Term, November, 1917.)

Venue — when motion for change of, denied — actions — witnesses — Code Civ. Pro. § 768.

Where, in an action against the city of New York, defendant moves under section 262 of the Greater New York Charter for a change of venue from Ulster county to New York county, plaintiffs, under section 768 of the Code of Civil Procedure, as amended in 1911, may oppose such motion by pleading the convenience of witnesses and asking that the place of trial be not

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changed, and, where it appears that a greater number of necessary and material witnesses reside in Ulster county than in New York county, defendant's motion will be denied and plaintiffs' granted.

Motion to change venue.

A. T. Clearwater, for plaintiffs.

Lamar Hardy, Corporation Counsel, for defendant.

Hasbrouck, J. MacArthur Brothers Company and James O. Winston and Thomas S. Winston have brought an action against the city of New York, involving the performance of the contract for the construction of the Ashokan reservoir and covering items growing out of alleged arbitrary determinations of value, pretended certifications by engineers and out of delay in acquiring the right of way of the Ulster and Delaware Railroad Company by the defendant, etc., to recover the sum of $1,220,580.92. The venue of the action is laid in the county of Ulster, and the defendant has moved to change it to the county of New York. The motion is based upon the provisions of section 262 of the Greater New York Charter: "All actions wherein The City of New York is made a party defendant shall be tried in that county within The City of New York in which the cause of action arose, or in the county of New York, subject to the power of the court to change the place of trial in the cases provided by law."

It is not questioned that the venue of an action against the city of New York, though fixed by statute, is still subject to change for the convenience of witnesses and to promote the ends of justice. In the section above quoted that power is reserved. The plaintiffs, relying upon such reservation in the statute, have

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answered the motion to change the venue from Ulster county to New York county by moving that the venue be held in Ulster county. The original motion came up in the Ulster Special Term of October sixth, and was adjourned to October twentieth to enable the parties to submit affidavits and memoranda and to overcome the objection that the plaintiffs had not three days before the motion day specified the relief they sought. The law is well settled that prior to 1911 the practice was under the language of section 268 to order the change of the venue. This forced a plaintiff to move in the county of New York to change the place of trial to another county in cases where it was permitted by law so to do. In brief the defendant claims the plaintiffs should be compelled to move in the county of New York to change the place on the ground of the convenience of witnesses. The plaintiffs oppose such claim and contend that the Code of Civil Procedure was amended in 1911 to permit them to oppose such motion by pleading the convenience of witnesses and asking that because thereof the place of trial be not changed. The language of the amendment of section 768 of the Code in part is as follows: "He (the opposing attorney) may, at least three days prior to the time at which the motion is noticed to be heard, serve upon the attorney for the moving party a notice, with or without affidavits or other papers in support thereof, specifying any kind or kinds of relief in the alternative or otherwise to which he claims to be entitled in the action whether the relief so asked for be responsive or not to the relief asked for by the moving party."

The foregoing provision has been interpreted in a recent opinion of Mr. Justice Rudd and with his interpretation and the reasons he assigns, I am in accord. *Buxbaum* v. *Paulsen,* 95 Misc. Rep. 717.

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The plaintiffs show a greater number of material and necessary witnesses residing in Ulster county than defendant shows residing in New York county. It is apparent that the convenience of witnesses would be served by retaining the place of trial in Ulster county. A speedier trial might be anticipated therein and the ends of justice promoted.

Motion to change the place of trial is denied and that to retain it in Ulster county is granted, with ten dollars costs to the plaintiffs to abide the event.

Ordered accordingly.

WILLIAM T. MORAN et al., Plaintiffs, *v.* QUINCY W. WELLINGTON et al., Defendants.

(Supreme Court, Steuben Trial Term, November, 1917.)

Lease — provisions of — landlord and tenant — action for reformation — judgments.

Where at the expiration of a five years' lease, with privilege to the tenants of a renewal for a like term upon the expiration of the contract on terms "then to be agreed upon," there was no mistake of fact as to its provisions, which were fully known to the parties, and neither fraud nor deception was practiced to procure the tenants' assent to the instrument, which was prepared by the landlord who assumed in good faith to explain the renewal clause, the tenants cannot be heard to complain that they misunderstood the legal import of their contract, which as to the renewal clause was void for indefiniteness.

Where at the expiration of the term and upon the tenants' refusal to surrender possession of the premises they bring an action for the reformation of the lease claiming that they are entitled to a renewal for an ensuing term of five years, but it appears that the landlord declined to arrange any terms for such continued lease and demanded possession of the premises, he is entitled to judgment accordingly.

ACTION upon a written lease.

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James O. Sebring, for plaintiffs.

Frank H. Hausner (Halsey Sayles, of counsel), for defendants.

SAWYER, J. This action involves the lease of store premises in the city of Corning, whereby plaintiffs became tenants thereof for a term of five years from February 1, 1912. The lease was prepared by the owner of the premises and contains, among others, the following stipulation: "With the privilege to the said lessee to renew this lease for the term of five years upon the expiration of this contract upon terms then to be mutually agreed upon."

Before its execution it was submitted to plaintiffs who after examination suggested various changes which were made. There can be no question but that when executed its contents were fully known by all parties and that no mistake of fact as to its provisions existed. Neither was there any fraud nor deception practiced upon plaintiffs to procure their assent to the instrument. It is true that, in the conversation concerning the proposed lease, the lessor in reply to plaintiffs' inquiry assumed to explain the legal effect of the clause in dispute, but it is not shown nor has it been claimed that such explanation was made in bad faith. Plaintiffs are presumed to have known the law and certainly could easily have procured expert advice upon the subject. If they failed to do this and rested content with their lessor's version thereof, honestly made, they cannot be heard to complain that he was mistaken and that they misunderstood the legal import of their contract. Under the circumstances here portrayed all negotiations must be deemed to have merged in the written instrument, and the plaintiffs' prayer for a reformation thereof denied. To hold otherwise

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would be to admit a principle which would open the door to an amendment and consequent avoidance of every contract in writing. *Greene* v. *Smith*, 160 N. Y. 533.

At the expiration of the five years' term plaintiffs refused to deliver possession of the premises, claiming that, under the quoted provision, they were entitled to a renewal for an ensuing term of five years. This defendants deny, have declined to arrange any terms for such continued lease, and demand possession of the property.

In a general way such agreements may be said to come under one of three classes:

First. Those which provide for a renewal of the lease for a specified time from its expiration upon terms impliedly the same.

Second. Those providing for the continuance of the tenancy after expiration of a lease and containing a definite method whereby the terms for the continuance are to be determined in event the parties fail to agree between themselves.

Third. Those providing for the continuance of the tenancy, but without provision as to terms or as to method by which they are to be determined.

Contracts coming within the first and second of such classes are undoubtedly enforcible. 24 Cyc. 991.

That under consideration, however, fails to make any provision for a fixing of its terms, if the parties disagree, and specifically negatives any idea that it is to be renewed upon the same terms. Its condition is that the additional term of five years is to be "upon the terms then to be mutually agreed upon." It presupposes a contract to be made between the parties and only between the parties. Coming, as it does, squarely within the third class alluded to, the question remains: How, if at all, can it be enforced?

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In the original lease all the terms are carefully agreed upon — for this continued term only the time is provided; all else, including the sum to be paid as rental, is left for future agreement. No such agreement is had nor can be had by the parties themselves. No third person can intervene to decide what those terms shall be. The court is likewise powerless to do so. Broad and full as its jurisdiction is it cannot make original contracts for parties. Neither has it at this stage of the law's development any process whereby it is enabled to force a meeting of the minds of litigants. Courts can only enforce contracts which the parties thereto have actually made.

This means contracts sufficiently definite for the court to determine what was agreed to. All others are beyond its power of interference and hence void for uncertainty, or as the commonly used phrase is " for indefiniteness."

That portion of the lease which is here under consideration specifically denies any agreement, aside from the term of years, by the parties and presents, as I view it, nothing which the court can interpose to sustain or enforce. It is nothing beyond a consent to make an agreement five years from its date if the parties can or will. That such contracts are void has been consistently held in this state. *Abeel* v. *Radcliffe,* 13 Johns. 297; *Whitlock* v. *Duffield,* 1 Hoff. Ch. 110; 26 Wend. 55; *Tracy* v. *Albany Exchange Co.,* 7 N. Y. 472; *Western Trans. Co.* v. *Lansing,* 49 id. 499; *Sourwine* v. *Truscott,* 17 Hun, 432; *Steinhardt* v. *Buel,* 1 Misc. Rep. 295.

It is interesting in this connection to note that while the Chancery decision in *Whitlock* v. *Duffield,* 1 Hoff. Ch. 110, was reversed in the Court of Errors (26 Wend. 55) the doctrine of lack of obligation in contracts such as this was expressly upheld. *Vide,* page 58.

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From the foregoing it follows that defendants must have judgment and that the injunction heretofore granted be vacated, with costs.

Judgment accordingly.

EDGAR C. MESSERSMITH, Plaintiff, *v.* THE AMERICAN FIDELITY COMPANY, Defendant.

(Supreme Court, Erie Special Term for Motions, November, 1917.)

Insurance (indemnity) — policy of — automobiles — criminal law — actions — negligence.

In an action upon a policy by which defendant agreed to indemnify plaintiff against loss by reason of use of his automobile there can be no recovery of the amount of a judgment recovered against the plaintiff, in an action for personal injuries caused by the operation of the automobile where it is proved on the trial, as pleaded in the answer, that the accident was caused through the commission of a misdemeanor by the driver of the automobile, who was under eighteen years at the time, and that such criminal act was participated in by the plaintiff as principal because he authorized and commanded such use of the automobile by the driver knowing his age.

MOTION by defendant for judgment on the pleadings.

Rebadow, Ladd & Brown (Franklin R. Brown, of counsel), for plaintiff.

Charles R. Newton, for defendant.

TAYLOR, J. This defendant, being an insurance corporation, insured this plaintiff against loss to him on account of injuries inflicted on other people by reason of the operation of an automobile owned by this plaintiff. Later a woman was injured on the streets of the

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city of Buffalo by being run against by said automobile which was under the control of another than this plaintiff. Such injured person brought an action and recovered a substantial judgment against this plaintiff by reason of said mishap. This plaintiff paid said judgment and then brought this suit to compel this defendant to indemnify him in the amount of the judgment.

This defendant in its answer — besides making appropriate denials — pleads in substance as an affirmative defense that when the mishap in question occurred the automobile was operated by an infant under eighteen years of age, not only to the knowledge and with the consent of this plaintiff, but pursuant to this plaintiff's instructions and under his orders; and that such operation of the automobile resulting in said mishap was a crime under the laws of the state of New York of the commission of which both the driver and his master, this plaintiff, were guilty as principals. The plaintiff contends that the policy should be strictly construed against the defendant which prepared it; that the policy contains no exception or reservation to which the defendant can now resort for salvation, and that no implied condition which will protect the defendant can be read into the policy. Of course, on this motion the answer must be taken as true and given all possible force and effect.

With all the arguments and claims of both parties the real and only question here involved is this: Does the following language of the policy, namely, "[the defendant] agree to indemnify the insured against loss * * * by reason of the * * * use * * * of the automobile" furnish security for financial loss incurred by the insured through use of the automobile by the insured directly, or by another under his orders which is criminal under the statutes of this state? Whether the result at which I am arriving be deemed

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to be derived from reading into the policy a condition favorable to the defendant or by declining to insert therein language relieving the defendant I care not. Whatever might be held as to accidents caused while an automobile driver is violating a city ordinance regulating speed, for example, or under one of many conceivable sets of circumstances differing from those here involved, it is inconceivable to me that this plaintiff can be indemnified under this policy if on the trial it be proved, as it is pleaded in this answer, that the mishap in question was caused through the commission of a misdemeanor by the driver of the automobile, and that such criminal act was participated in by the plaintiff as principal because he authorized and commanded such use of the automobile by the driver, knowing the driver to be under the age of eighteen years.

I appreciate that insurance policies are in general to be construed strictly against the companies which draft and issue them; however, this rule is not so broad as to compel a construction which would force such companies to save harmless those of their policy holders who suffer financial loss on account of their having committed crimes. And this, too, even though the policy does not except criminal acts; for such an exception, in my judgment, even though express, would be valueless because contrary to good public policy. A contrary holding would permit such an insurance policy holder not only to take advantage of his own wrong but to profit financially from his own criminal act. If the estate of a suicide cannot recover under a life insurance policy which is silent as to death by suicide (and this is now the law in the state of New York — *Shipman* v. *Protected Home Circle,* 174 N. Y. 406, 410), surely, *a fortiori,* this plaintiff cannot recover if this defendant proves what it has alleged in defense.

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I think that the answer pleads a good defense and, therefore, that this motion cannot prevail. Ten dollars motion costs to the defendant.

Motion denied, with costs.

JAMES W. COLLINS, Plaintiff, *v.* LIZZIE F. SCANNELL, as Administratrix, etc., Defendant. (Action No. 1.)

(Supreme Court, New York Trial Term, December, 1917.)

Office and officer — who not a public officer — actions — city of New York — highways.

The superintendent of highways in any of the boroughs of the city of New York is not a public officer, and one illegally removed from such office cannot maintain an action for money had and received to recover the amount of salary paid to defendant's testator while he occupied the office from which plaintiff had been ousted.

ACTION for money had and received.

John W. Browne, for plaintiff.

O'Gorman, Battle & Vandiver, for defendant.

COHALAN, J. Plaintiff, in an action for money had and received, sues the defendant's testator to recover the sum of $24,166.68. This money represents salary received by George F. Scannell, now deceased, while he occupied, from the 25th of January, 1904, to the 1st day of December, 1908, the position of superintendent of highways in the borough of Manhattan, and from which the courts have decided the plaintiff was illegally removed on or about the 1st day of January, 1904. The plaintiff asserts that the money paid to the

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defendant's testator was a salary incident to the position of superintendent of highways; that it legally belonged to him, and that such payment to a *de facto* officer is a bar to any recovery against the city of New York. If the position over which there has been so much contention is a public office, then the *de jure* officer is right and may follow the salary attached to the office and recover it from the *de facto* officer. But in this case the courts have held that the superintendent of highways is not a public officer. In *People ex rel. Collins* v. *McAneny,* 144 N. Y. Supp. 121, 123; affd., 155 App. Div. 923; affd., 209 N. Y. 525, the court said: "While the word 'office' is sufficiently broad in its possible application to embrace any employment where duties are to be performed, the words 'during his term of office' limit the meaning to an office of a public character having a definite term. Certainly the words do not reasonably describe an appointee whose duties are to render assistance to a public officer under his direction, for no described 'term of office' which could measure the duration of the employment. The relator is to be classed as an employee rather than as an officer within this section of the charter." In the case of *Sutliffe* v. *City of New York,* 132 App. Div. 831, the court classified municipal employment into three groups — *first,* public officers, where the salary is fixed by law as incident to the position; *second,* where clerks and subordinates are protected in their positions (a) by the provisions of the charter which forbid their removal without notice or an opportunity to be heard; (b) by the Veteran Law, and (c) by the civil service laws covering positions in the classified service, subject to competitive examination, and, *third,* a class of employees in minor positions whose compensation is dependent upon work performed and who may not recover there-

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for unless for services actually rendered. In the first class the rightful incumbent has an undoubted cause of action over the *de facto* incumbent for money had and received. In respect, however, to the right of other employees to recover for illegal removal the court in the *Sutliffe* case said: "I can see no reason in principle why the question of what they are entitled to recover on being reinstated should not be governed by the rule applicable in actions for damages for breach of contract of employment, with this difference, that in the public service the courts have established the proposition that the discharged employee must first be reinstated before he may recover at all. The amount of recovery will then be *prima facie* the amount of salary or compensation fixed by law or regulation, and if the plaintiff proves the breach, which is established, of course, by the proof of his reinstatement, then he will be entitled to that amount, subject, however, to the public policy which says that if the public employer has once paid for services to the one rendering them, it will not be held liable again to the one who ought to have been allowed to render them." It would seem, therefore, that whatever right the plaintiff had to recover would be the right to recover from the city on the theory that the city, by illegally ousting him from his position, had broken an existing contractual relationship. It follows that the complaint must be dismissed.

Judgment accordingly.

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JAMES W. COLLINS, Plaintiff, *v.* LIZZIE F. SCANNELL, as Administratrix, etc., Defendant. (Action No. 2.)

(Supreme Court, New York Trial Term, December, 1917.)

Bonds — action to recover — highways — city of New York.

In an action to recover upon bonds given to the city of New York by defendant and her testator, covenanting to reimburse the city for the amount of salary paid to said testator as superintendent of highways of one of the city boroughs for two certain years, which might thereafter accrue or become due to the legally appointed superintendent of highways of said borough, it is incumbent upon the plaintiff, the assignee of the bonds, to show that the city was required to and did pay to him the whole or some part of said salary which it had already paid to defendant's testator for services as superintendent of highways during the years in question, and as the city which during that time never paid the salary to any person other than defendant's testator may not recover on the bonds, the complaint should be dismissed.

ACTION to recover on bonds.

John W. Browne, for plaintiff.

O'Gorman, Battle & Vandiver, for defendant.

COHALAN, J. Plaintiff sues to recover the sum of $10,000 on two bonds, executed respectively in sums of $5,000 each on November 15, 1904, and January 16, 1904, by the defendant and the defendant's testator. The bonds were furnished by the defendant and the defendant's testator because the city of New York refused to pay the defendant's testator's salary for the years 1904 and 1905 unless the defendant and the defendant's testator agreed to *reimburse* the city in case the city should subsequently be required to pay

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the same salary again to the plaintiff herein. The bonds in terms specifically read that the defendant's testator and the defendant, his wife, "covenant, promise and agree to pay to the City of New York and *reimburse* it for any and all sums of money which the city of New York pays to said George F. Scannell, both for salary already paid or which is to become due and accrued, and for salary which it may pay to said George F. Scannell which may hereafter accrue or become due to the legally appointed superintendent of highways of said borough of Manhattan * * *." The bonds are indorsed as indemnity bonds and were undoubtedly so regarded by the parties thereto. The marking thereupon, the language therein and the circumstances surrounding their execution seem to establish this as a fact. They were not given to cover the entire period that the defendant's testator was superintendent of highways, but only to cover the salary paid by the city during the years 1904 and 1905. In the complaint it does not appear that the city of New York has been damnified in any sum by reason of having paid the defendant's testator the salary of superintendent of highways for the years of 1904 and 1905. The city never paid to the plaintiff or any other person other than Scannell the salary during these years. The indemnitee, on a contract of indemnity, may not recover if no damage has been suffered, and if he has suffered damage he may recover only to the extent that he has been damnified. It is my view that it was incumbent upon the plaintiff to show that the city of New York was required to pay and did pay to him the whole or some part of the sum of $10,000 which it had already paid to the defendant's testator for his services as superintendent of highways during the years in question. *Holmes* v. *Weed,* 19 Barb. 128; *McGee* v. *Roen,* 4 Abb. Pr. 8; *Hudson River Telephone*

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Co. v. *Ætna Life Ins. Co.*, 66 Misc. Rep. 329; affd., 138 App. Div. 931; *White* v. *Maryland Casualty Co.*, 139 id. 179. The plaintiff, as assignee of the bonds, stands in no better position with respect to them than the city of New York, as the assignor, and since the city may not recover on the bonds the plaintiff is without remedy, and the complaint is dismissed.

Judgment accordingly.

Matter of Supplementary Proceedings of JOHN F. DE ANGELLI, Judgment Creditor, *v.* HENRY E. DIXEY, Judgment Debtor.

(Supreme Court, New York Special Term, December, 1917.)

Supplementary proceedings — when motion to dismiss granted — theatres — executions — Code Civ. Pro. § 2458 (1).

A theatre in the city of New York at which a judgment debtor was playing an engagement as an actor, at the time of the institution of proceedings supplementary to an execution issued upon the judgment recovered against him, is not "a place for the regular transaction of business in person" in the county of New York, within the meaning of section 2458(1) of the Code of Civil Procedure, it appearing that he transacted no business at the theatre during his engagement there, and that when not on the stage he was in his dressing-room changing for the next act, and his motion to dismiss the proceedings will be granted.

MOTION to dismiss supplementary proceedings.

Samuel H. Wandell, for judgment debtor and motion.

Farrell & Bevier, for judgment creditor, opposed.

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GIEGERICH, J. The judgment debtor moves to dismiss the supplementary proceedings. The only question that need be discussed is whether or not the debtor had "a place for the regular transaction of business in person" within the county of New York within the meaning of subdivision 1 of section 2458 of the Code of Civil Procedure. The facts are as follows: The debtor, at the time of the institution of the proceedings, was playing an engagement as an actor at a theatre in the county of New York, attending at the theatre only during the evening performances and two weekly matinees; but was never at the theatre during the usual hours of business, except the two weekly afternoon performances. The part which he played required several changes of costume and, when not on the stage, he was in his dressing-room changing for the next act. By the rules of the theatre no person was admitted behind the scenes or at the stage entrance during the performance, and no person desiring to see him on business had any right to call at the theatre for that purpose. There was always a guard stationed at the stage door of the theatre, whose business it was to prevent any outsiders from entering the house. The debtor has not transacted any business at the theatre during his engagement there. These facts do not, in my opinion, show that such theatre was "a place for the regular transaction of business" by the debtor. He did no business there in the ordinary sense of that word. No one who had business to do with him could have secured access to him at the theatre. The case is perceptibly different from *Burke* v. *Burke,* 27 Misc. Rep. 684, where it was held that the school-house where a teacher is engaged is a place for the regular transaction of business within the meaning of the statute quoted. A teacher is in control of his school building, or school-room, as the

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case may be, and, as a rule, can allow persons who have business to transact with him to have access to him and can transact his personal business with them, if he chooses to do so. The present case is more like *Bank of Columbia* v. *Lawrence,* 26 U. S. (1 Pet.) 578, 582, in which the court said: "The evidence does not show that the defendant had a place of business within the city of Washington, according to the usual commercial understanding of a place of business. There was no public notoriety of any description given to it as such. No open or public business of any kind was carried on, but merely occasional employment there, two or three times a week, in a house occupied by another person; and the defendant only engaged in settling up his old business." The motion should be granted, with ten dollars costs.

Motion granted, with costs.

MANHATTAN LIFE INSURANCE COMPANY, Plaintiff, *v.* HAMMERSTEIN OPERA COMPANY et al., Defendants.

(Supreme Court, New York Special Term, December, 1917.)

Trial — in foreclosure action — pleading — actions.
Motions and orders — when motion to frame issues denied — default — General Rules of Practice, rule 31.

Though the answer in a foreclosure action pleads counterclaims which if defendant had brought actions thereon would have been triable as matter of right by a jury, it is not entitled to such a trial in the foreclosure action.

Where defendant's motion to frame for a jury trial the issues raised by its counterclaim and the reply thereto was not made within twenty days after the joinder of issue, as required by rule 31 of the General Rules of Practice, and sufficient reason is not shown for overlooking the default, the motion will be denied in the discretion of the court.

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MOTION to frame for a jury trial the issues raised by the defendant Hammerstein Opera Company's counterclaim and the reply thereto by the plaintiff.

Seabury, Massey & Lowe, for defendant and motion.

Kelly & Hewitt, for plaintiff, opposed.

GIEGERICH, J. The defendant Hammerstein Opera Company moves for an order to frame for a jury trial the issues raised by its counterclaim and reply thereto by the plaintiff. The action is brought to foreclose a mortgage, and some of the material allegations of the complaint are denied, and in addition the answer contains counterclaims which would have been triable as a matter of right by a jury, if brought as actions by the said defendant against the plaintiff. But this fact does not, as of right, entitle the defendant so counterclaiming to have a jury trial of the issues of his counterclaim. *Mackellar* v. *Rogers,* 109 N. Y. 468; *Ettlinger* v. *Sailors' Snug Harbor,* 122 App. Div. 681. The facts in *Mackellar* v. *Rogers, supra,* were very close in their resemblance to the facts in the present case. That action, like this, was to foreclose a mortgage, and there, as here, a counterclaim was set up demanding a money judgment. In that case the money judgment was for money due and also for damages for breach of contract. In this case the money judgment demanded in one of the counterclaims is for damages for the plaintiff's false representations in selling certain real estate to the counterclaiming defendant. In both cases the counterclaims are of such character that the defendants would have been entitled, as a matter of right, to jury trials if they had sought to enforce their claims as plaintiffs instead of as defendants. I am therefore unable to distinguish the *Mackellar* case

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from the present case upon the facts. In that case the court said on the defendant's application at Special Term for the framing of issues, that: "To grant or refuse such request was clearly a matter of discretion," and further on the court (at p. 471) said: "The appellant's contention rests upon section nine hundred and seventy-four (§ 974) of the Code of Civil Procedure, which provides that 'where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact arising thereupon is the same as if it arose in an action brought by the defendant against the plaintiff for the cause of action stated in the counterclaim, and demanding the same judgment.' The conditions upon which the right depends exist in favor of the defendant, but that right is not absolute or unqualified; it is relative and limited, and, in the words of the heading of section 974, 'within' certain 'foregoing sections' only is 'a counterclaim to be deemed an action.' We find nothing there which required a court to sanction the course pursued by the defendant. If tolerated, it would enable a person sued to postpone and delay the plaintiff in the prosecution of a just cause until at a convenient time and before another tribunal he had presented a cause of action subsequently brought into court, and the determination of which has no necessary connection with the plaintiff's demand in suit. It would, moreover, permit him to do this after selecting a different court for the trial of his issue, and evade that trial at the moment it was to commence by the expression of his mere wish to go into a different forum, thus putting his adversary at defiance and interrupting the court in the transaction of business which he himself had in a formal manner brought before it." This being a case, therefore, where the moving party is not entitled as of right to

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the jury trial sought, but a case where the granting or refusing of the application for the framing of issues is a matter of discretion with the court, and the defendant having failed to make its application within twenty days after issue joined, as required by rule 31 of the General Rules of Practice, and having also failed to show any sufficient reason for overlooking its default under that rule, the motion must be denied, with ten dollars costs.

Motion denied, with costs.

Matter of the Application of M. GROH'S SONS, a Domestic Corporation, for a Writ of Certiorari to Review the Determination of JESSE S. PHILLIPS, as Superintendent of Insurance, etc.

(Supreme Court, New York Special Term, December, 1917.)

Certiorari — writ of, to review alleged determination of superintendent of insurance — New York Fire Insurance Exchange — Insurance Law, § 141.

An application for a writ of certiorari to review an alleged determination of the superintendent of insurance of the state for an order for the removal of an alleged unfair discrimination in fire insurance rates consisting in the fixing by the New York Fire Insurance Exchange of a much lower rate on unmanufactured than on manufactured furs in storage warehouses equipped with sprinklers to extinguish fires and the refusal of that organization to fix in a similar way a lower rate for unmanufactured than for manufactured furs in storage warehouses not so equipped, denied, but without prejudice to a renewal of the application for a hearing at which the New York Fire Insurance Exchange can be heard, the superintendent of insurance basing his refusal to interfere, and to issue the order asked for, upon the language of section 141 of the Insurance Law.

APPLICATION for a writ of certiorari.

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Thomas F. Keogh, for relator.

Merton E. Lewis, Attorney-General of the State of New York (Leroy A. Lincoln, of counsel), for respondent.

GIEGERICH, J. This is an application for a writ of certiorari to review an alleged determination of the superintendent of insurance of the state of New York upon the relator's application to have him order the removal of an alleged unfair discrimination in fire insurance rates, consisting in the fixing by the New York Fire Insurance Exchange of a much lower rate on unmanufactured than on manufactured furs in the case of storage warehouses which are equipped with sprinklers to extinguish fires, and the refusal by that organization to fix, in a similar way, a lower rate for unmanufactured than manufactured furs in the case of storage warehouses which are not equipped with such sprinklers. The superintendent of insurance based, and bases, his refusal to interfere and to issue such an order as the relator seeks upon the language of section 141 of the Insurance Law, which, in part, is as follows: "* * * nor shall any such person, corporation, association or bureau, or any person, association or corporation authorized to transact the business of insurance within this state, fix or make any rate or schedule of rates or charge a rate which discriminates unfairly between risks within this state of essentially the same hazard or, if such rate be a fire insurance rate, which discriminates unfairly between risks in the application of like charges or credits, or which discriminates unfairly between risks of essentially the same hazards and having substantially the same degree of protection against fire. Whenever it is made to appear to the satisfaction of the superintendent of

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insurance that such discrimination exists, he may, after a full hearing either before himself or before any salaried employee of the insurance department whose report he may adopt, order such discrimination removed * * *;" his argument being that, as this application deals not with risks of the "same hazards and having substantially the same degree of protection against fire" but with risks having widely different degrees of fire protection, there is no requirement of the statute that applies. On the other hand, the relator, conceding that the hazards are different and making no complaint at the fixing of a higher rate for his building than for better protected buildings, still insists that the statute covers his grievance in the words "which discriminates unfairly between risks in the application of like charges or credits," and that as sprinklered warehouses are credited with a difference in rate in favor of unmanufactured over manufactured furs, unsprinklered warehouses should be credited with some difference of a like character. On behalf of the superintendent of insurance, it is further claimed that there has not yet been held before him a proceeding of a sufficiently formal character to warrant the statement that he has made a determination and that there is not in his possession matter that can properly be made the subject of a return. He recognizes, however, that the court may, if the facts do not warrant the issuance of a writ of certiorari, grant to the relator instead a mandamus to compel the commissioner to act. The commissioner's attorney says in his brief, however, that no mandamus is necessary and that, upon a mere expression of opinion by the court that the relator has shown facts that by any possibility may entitle it to relief, the superintendent will regard such expression of opinion as sufficient warrant for him to give notice of a hearing upon the

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relator's complaint and to conduct such hearing in such a way as to establish a record which may be regularly reviewed by writ of certiorari. I am of the opinion that, when the facts are all properly presented, the relator may well be shown to be entitled to the relief it seeks, but I do not think a return could be made, as the matter stands now, which would adequately present the facts and the question for determination. The question is an important one and probably will affect many others besides the relator. When a ruling is finally made it should not be merely upon letters written back and forth, but upon a more adequate record upon a real hearing at which the New York Fire Insurance Exchange should be heard or given an opportunity to be heard, as well as the relator. The motion is therefore denied, without costs and without prejudice to a renewal after a hearing of the kind indicated.

Motion denied, without costs.

FREDERICK KERR, Plaintiff, *v.* FREDERICK TANINI TAGLIAVIA, Defendant.

(Supreme Court, New York Trial Term, December, 1917.)

Judgments — when courts of this state will not recognise a personal liability arising from foreign judgment — jurisdiction — actions — service of process — negotiable instruments.

The courts of this state will not recognize a personal liability arising from a foreign judgment obtained upon service of process beyond the territorial jurisdiction of the foreign state.

Where, in an action brought upon a judgment obtained in England against defendant as acceptor of a bill of exchange payable in that country, it appears that the service of process

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in the English action was effected upon the defendant personally in the state of New York but that he did not appear or defend, he is entitled to judgment.

ACTION upon judgment obtained in England against defendant as an acceptor of a bill of exchange.

J. Hazelton, for plaintiff.

Julian B. Shope, for defendant.

HOTCHKISS, J. This action is brought upon a judgment obtained in England against this defendant as acceptor of a bill of exchange payable in England. Service in the English action was effected upon the defendant personally in New York, but the defendant did not appear or defend. It is not disputed that the following "rules" of court, made pursuant to act of Parliament, were in force and applicable to the action: "1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever * * * (e) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; or * * * (g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." The defendant in contesting the validity of this judgment relies upon the general rule that a foreign judgment not founded upon service effected within the foreign jurisdiction cannot be recognized. The plaintiff concedes that such is the general rule but argues with much earnestness that this defendant, by virtue of his acceptance of a bill of exchange

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payable in England, must be regarded as having consented in advance to the method of service provided for in the English rules of court, and that the case, therefore, presents an exception to the general rule. Although unable to find any authorities precisely in point, plaintiff cites numerous cases in which particular circumstances have been held to except the case from the operation of the general rule and contends that the general principles there applied are equally applicable and controlling in this case. I shall not attempt to analyze the cases in detail. Suffice it to say they fall into one or the other of two classes of exceptions to the general rule above stated: (a) Cases in which the foreign law of process is held to be binding upon a defendant, by reason of his citizenship or residence in the foreign state, and in recognition of the allegiance which he owes in consequence to such state (see *Hunt* v. *Hunt*, 72 N. Y. 217); (b) cases in which the defendant is a corporation doing business in a foreign state, the laws of which provide a method of service upon foreign corporations and condition the right to do business within the state upon subjection to such laws. The former class of cases obviously has no bearing upon the present case. The latter class may give a semblance of support to plaintiff's contention since the cases establish that a defendant's consent to submit to a foreign law of process may be *implied* as matter of law under certain circumstances. But upon an examination of the "circumstances" the analogy which plaintiff seeks to invoke disappears. A corporation in doing business in a foreign state avails itself of a privilege which that state has inherent power to withhold, and it would, therefore, be manifestly unjust to permit the corporation, while enjoying the privilege, to escape the corresponding burdens upon which the privilege is conditioned. For illustrations see *Blake*

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v. *McClung,* 172 U. S. 239–255. Plaintiff argues that the English rules of court are likewise in effect conditions upon which foreigners may do business in that country, and their consent thereto will be accordingly implied. But the construction of the rules as conditions is, I think, wholly unwarranted. Nor can the mere acceptance of a bill payable in England be regarded as " doing business " in that country. Furthermore, since England has no power to prevent a foreigner from *accepting* a bill payable in England, it would seem that its control over the contract is restricted to the *performance* thereof *in England;* and hence, to draw an analogy to the foreign corporation cases, plaintiff would seem to be obliged to argue that England, as a condition of permitting defendant to perform his obligation, requires him to consent to extraterritorial service upon him for non-performance. The plaintiff contends, however, that the defendant, merely by obligating himself to perform the contract in England, thereby adopted the English law as a part of the contract, and impliedly consented to be governed by it in remedial as well as in substantive matters. But such is not the law. In substantive matter, it is true, the *lex solutionis* generally governs, and the application of the *lex solutionis* is based upon the actual or presumed intent of the parties. *Union Nat. Bank* v. *Chapman,* 169 N. Y. 538; *Pritchard* v. *Norton,* 106 U. S. 124. But the *lex fori* governs as to remedial matters irrespective of the intent of the parties. *Union Nat. Bank* v. *Chapman, supra; Scudder* v. *Union Nat. Bank,* 91 U. S. 406. It would be a manifest absurdity to contend that remedial laws derive their validity from the consent of defendant. Within the rule just stated the English judgment now sued upon is no doubt valid in England, but its validity in England is not based on consent of the defendant. Since, there-

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fore, the defendant did not consent expressly or impliedly to the process in question, and since he was not subject thereto by reason of citizenship or residence in England, the general rule remains applicable, namely, that this state will not recognize a personal liability arising from a foreign judgment obtained upon service of process beyond the territorial jurisdiction of the foreign state.

Judgment for defendant.

WILLIAM C. STRANGE, Plaintiff, *v.* HARRIS ROSENBERG, YETTA LONDON, THE CITY OF NEW YORK, ABRAHAM DICKMAN and LOUIS KAHAN, Composing the Firm of DICKMAN & KAHAN, "ADOLPH" GREENBERG, and "ADOLPH" GAUBARDS, the Name "Adolph" in Each Instance Being Fictitious, the Real Name of Said Defendants Being Unknown to the Plaintiff, Defendants.

(Supreme Court, New York Special Term, December, 1917.)

Equity — power of, to relieve — mortgages — default — election.
Foreclosure — of purchase money mortgage — default in payment of interest — evidence — judgments — election.

Equity has power to relieve a mortgagor from the operation of a clause in the mortgage giving the mortgagee the right to elect that the whole amount of principal and interest shall be due and payable in case of default in payment of interest.

Where, in an action to foreclose a purchase money mortgage which provided that in case of default in the payment of interest for ten days the mortgagee might elect to declare the whole principal due, it is apparent from the evidence that the default in the payment of the first interest, for failure to pay which the action was brought, was not occasioned by the wilful neglect of defendants, judgment will be directed relieving them from the consequences of their default upon payment of all arrearages of interest, with interest thereon, within five days after entry of judgment.

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ACTION to foreclose a mortgage.

Hardy, Stancliffe & Whitaker (Noah A. Stancliffe, of counsel), for plaintiff.

Jacob I. Berman, for defendants Rosenberg and London.

NEWBURGER, J. This is an action to foreclose a purchase money mortgage given by the defendant Rosenberg to one Mabel S. Suydam, which provided that, in case of default in the payment of interest for ten days the mortgagee might elect to declare the whole principal due. The first interest, amounting to $180, became due on August 1, 1917, and it is for a failure to pay this interest that this action is brought. Plaintiff admitted that he was present when the mortgage herein was executed; that he knew the defendant London and his place of residence; that the mortgage which was executed on February 1, 1917, was assigned to plaintiff on or about April 16, 1917; that he did not notify defendant London of such assignment, although he admits that he met London in June while they were both in court at the trial of a suit for commissions on the sale of the mortgaged premises. It also appears that defendant London, on August 2, 1917, called at the residence of Mabel S. Suydam, in Brooklyn, for the purpose of paying the interest, and on the following day called at the office of the plaintiff for the purpose of ascertaining how he could pay the interest to Mrs. Suydam, but found plaintiff absent from the city. Plaintiff testified that he returned to the city on August 2, 1917, but left town immediately and did not return until the end of the month. It also appeared that London called at the residence of Mrs. Suydam, the mortgagee, and made a tender to her daughter-in-law. The *lis pendens* herein was filed on August 25,

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1917. The summons was not served, the defendants voluntarily appearing on the 19th day of September, 1917. On the 13th day of September, 1917, the defendants tendered to plaintiff's attorneys the interest with interest thereon, which was refused. The defendants were able and willing to pay the interest. To permit a foreclosure under these circumstances would be unconscionable. See *Isaacs* v. *Baldwin*, 105 N. Y. Supp. 38; affd., 114 App. Div. 903. In *Schieck* v. *Donohue*, 92 App. Div. 334, it was held: "In equity forfeitures will not be enforced where the debtor was ready, willing and able to pay and made every reasonable effort to find the creditor to make a tender or where the tender was prevented or excused by any act of the creditor and the debtor avers a willingness and ability to pay. 3 Pom. Eq. Juris. § 1407; 21 Ency. Pl. & Pr. 551, 559, 575; Wilt. Mort. Forec. 47; *Hale* v. *Patton*, 60 N. Y. 233; *Bennett* v. *Stevenson*, 53 id. 508; *Wilcox* v. *Allen*, 36 Mich. 160, 169; *Zlotoecizski* v. *Smith*, 117 id. 202. * * * In *Noyes* v. *Clark* (7 Paige, 179), which was an action by a second assignee of a mortgage to foreclose it, where neither assignment had been recorded and the mortgagor had tendered the installment of interest due to the mortgagee who refused to accept the same on account of the assignment, the court declared that there could be no valid election to declare the principal due, and that, if the holder of the mortgage intended to take advantage of the neglect of the mortgagor to pay the interest, 'it was his duty, as an honest man, to have given notice * * * of the assignment and of his residence, or the place where the payment could be made.'" It is therefore apparent that the default in the payment of the interest was not occasioned by the willful neglect of the defendants. It has been repeatedly held that a court of equity has power to relieve a mortgagor from the

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operation of a clause contained in the mortgage giving the mortgagee the right to elect that the whole amount of principal and interest shall be due and payable in case of default in the payment of interest. *Noyes* v. *Anderson*, 124 N. Y. 175; *Smith* v. *Lamb*, 59 Misc. Rep. 568. Judgment is directed relieving the defendants from the consequences of the default, upon the defendants paying all arrearages of interest, with interest thereon, within five days after entry of judgment herein. No costs to either party.

Judgment accordingly.

FRANK E. RAFEL, Plaintiff, *v.* EMILE F. MAURER et al., Defendants.

(Supreme Court, New York Special Term, December, 1917.)

Mortgages — foreclosure — when mortgagor not relieved from liability for deficiency — contracts — judgments.

In an action to foreclose a mortgage a mortgagor who has subsequently transferred the property is not relieved from liability for a deficiency judgment where there is no agreement in writing between his grantee and the mortgagee extending the payment of the mortgage or changing the rate of interest.

ACTION to foreclose a mortgage.

Sydney W. Stern, for plaintiff.

Blandy, Mooney & Shipman, for defendant Maurer.

William G. Johnson, for defendants Mathewson & Dymock.

NEWBURGER, J. This action is brought to foreclose a mortgage, and the only question to be determined is as to the liability of the defendant Maurer for the deficiency. The mortgage was made by the defendant Maurer for the sum of $4,000, with interest at the rate

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of four and one-half per cent. Subsequently he transferred the property to the defendant Stokes, and the rate of interest at that time was five per cent. On September 15, 1914, plaintiff wrote a letter to the defendant Miss Stokes notifying her that the rate of interest on the mortgage from October 1, 1914, would be six per cent. There was no agreement in writing extending the payment of the mortgage or changing the rate of interest. As was said in *New York Life Ins. Co.* v. *Casey*, 178 N. Y. 385: "That the mere change in the rate of interest * * * and in the payment by the owner of the mortgaged property is not in itself sufficient consideration for an agreement. * * * An agreement, which was unenforcible for want of any consideration, would not discharge the surety. The plaintiff did not bind itself to do anything in consideration of receiving an increased interest and the defendant does not appear to have received any benefit. There were no mutual promises disclosed." The evidence in this case clearly fails to establish that there was any binding agreement between the parties to change the rate of interest or that there was any consideration for such agreement. Judgment must therefore be directed for the plaintiff.

Judgment for plaintiff.

EMMA C. WOENTZ, Plaintiff, *v.* THE CITY OF NEW YORK, Defendant.

(Supreme Court, Queens Special Term for Motions, December, 1917.)

Amendment — action for personal injuries against city of New York — repetition of allegations alleging nuisance — Greater New York Charter, § 261; Laws of 1886, chap. 572, § 1.

Where, in an action against the city of New York to recover for personal injuries, plaintiff moves to amend the complaint by adding an alleged second cause of action setting forth the

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same statement of facts as alleged in the first cause of action for negligence, but alleging nuisance, and there is no allegation that defendant created or authorized the conditions stated as the cause of the injuries sustained, or that defendant committed any positive wrong, the motion to amend will be denied upon the ground that if granted it will serve no useful purpose and would ultimately prove futile.

It must be assumed that defendant's corporation counsel will interpose as a defense to the proposed second cause of action every statutory bar in its favor, and any proper plea which asserts a statutory prohibition is sufficient for defendant to obtain the benefits provided by either section 261 of the Greater New York Charter or section 1 of chapter 572 of the Laws of 1886, or both.

MOTION to amend complaint.

William H. Siebrecht, for plaintiff.

Lamar Hardy, corporation counsel (Edward S. Malone, of counsel), for City of New York.

VAN SICLEN, J. Motion by plaintiff for leave to amend complaint by adding thereto an alleged second cause of action setting forth the same statement of facts as alleged in the first cause of action for negligence, but alleging nuisance. Defendant's corporation counsel opposes the motion and contends that said alleged second cause of action is merely a repetition of the first cause of action based on negligence, to which it has interposed a separate defense that the same is barred by the expiration of the time required for the filing of claim and notice of intention to commence an action under the provisions of section 261 of the Greater New York Charter; that said second cause of action in the proposed amended complaint does not set forth facts sufficient to constitute a cause of action, and that this motion is made solely for the

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purpose of saving the plaintiff from a dismissal of her complaint. The plaintiff argues that her claim is not barred by limitation in that said section 261 of the defendant's charter provides only for the limitation of actions for injuries to real or personal property and not for personal injuries, and that chapter 572, section 1, of the Laws of 1886 does not apply to nuisance, and that section 382 of the Code of Civil Procedure alone is applicable. The allowance of amendment of pleadings is within the sound discretion of the court, and the court will uniformly grant motions to amend upon terms, provided such amendment will serve any just and useful purpose. Upon this motion it must be assumed that defendant's corporation counsel will interpose as a defense to the proposed second cause of action every statutory bar in its favor; indeed, it is the duty of such corporation counsel, which he cannot omit, and the pleading of which the court may compel. *Butler* v. *Johnson,* 111 N. Y. 204; *Winter v. City of Niagara Falls,* 190 N. Y. 198. It seems, therefore, that the defendant is not compelled to plead specifically any statute in order to obtain the benefit thereof, and therefore any proper plea which asserts the statutory prohibition is sufficient for the defendant to obtain the benefits provided either by section 261 of its charter, or chapter 572, section 1, of the Laws of 1886, or both. *Brehm* v. *City of New York,* 104 N. Y. 186; *Harrigan* v. *City of Brooklyn,* 119 id. 156. There can be no question as to the power of the legislature to make exception in favor of the defendant to sections 382 and 383 of the Code of Civil Procedure. This court has heretofore held, and does now hold, that section 261 of defendant's charter refers to and includes actions for personal injuries. A careful reading of plaintiff's proposed second cause of action fails to convince this court that the same sets forth a cause of

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action for nuisance, but, on the other hand, it is clear that at the most negligence of defendant is alleged. Said second cause of action contains no allegation that the defendant created or authorized the conditions which are set forth to be the cause of the injuries sustained, or that defendant committed any positive wrong. Under the authorities, therefore, the allegations set forth constitute negligence and not nuisance. *Hayes* v. *Brooklyn Heights R. R. Co.*, 200 N. Y. 183; *Dickinson* v. *City of New York*, 92 id. 584; *Francis* v. *Gaffey*, 211 id. 47; *Swords* v. *Edgar*, 59 id. 28. From the foregoing, therefore, it appears clear that the motion if granted could serve no useful purpose and would ultimately prove futile, and it becomes the court's duty to deny the same.

Motion denied, with ten dollars costs.

ELMO BROWN, BERNARD CALL and WALTER H. WHIFFEN, Constituting the Board of Trustees for School District No. 8, Town of Greenburgh, Westchester County, State of New York, Plaintiffs, *v.* WILLIAM BUNSELMEYER, WILLIAM C. EMERICK and CHARLES H. SCHOCK, Individually and as Claiming to Constitute the Town Board of Education for the Town of Greenburgh, Westchester County, State of New York, and WILLIAM A. BUCKLEY, Receiver of Taxes of the Town of Greenburgh, Westchester County, State of New York, Defendants.

(Supreme Court, Westchester Special Term, December, 1917.)

Constitutional law — statutes — schools — jurisdiction — Education Law — town school boards — United States Constitution, Fourteenth Amendment — New York Constitution, art. IX, § 1; art. X, § 2.

Under the constitutional provision (State Const. art. IX, § 1) that the legislature shall provide "for the maintenance

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and support of a system of free common schools, wherein all the children of this State may be educated" the legislature has power to provide such a system or systems as will meet the needs of each locality, and its classification is not subject to judicial review; but it is not required to provide the same system or organization for each locality in the state.

The statute (Education Law, art. XI-A, §§ 330-365, added by chapter 328 of the Laws of 1917), the purpose of which is to reorganize the rural school districts into a town school system and provide for the creation of a town board of education in each town, with certain exceptions, and similar boards in certain union free school districts, the qualification of members of such boards, appointment of officers, their powers and duties etc., is constitutional and valid.

Section 331 of the Education Law, which establishes a town board of education in each town of the state, having jurisdiction over all the schools of the town as thereinafter provided, "except in union free school districts having a population of fifteen hundred or more or employing fifteen teachers or more at the time this act takes effect, and the school districts in the several towns of a county which adjoins a city having a population of one million or more and in which there are only two district superintendents," does not violate the Fourteenth Amendment of the United States Constitution in that it unlawfully discriminates against the citizens of Westchester county and denies to them the equal protection of the laws, because the exception can only apply to and affect Nassau county.

The provision of section 352 of the Education Law for an apportionment and distribution, by the old trustees of the school districts subject to the statute, of the funds remaining in their hands after closing the financial affairs of the districts, except state moneys, among the taxpayers of the district, violates no constitutional provision, such transfer being simply from one public authority to another for convenience of administration.

The provision of section 353 of the Education Law which makes the bonded indebtedness for the several school districts affected a charge against property subject to tax for the maintenance of the schools of the town, and provides for an appraisal of school property, a credit to each district of its

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value after deducting the bonded indebtedness and an apportionment and distribution of the amount credited to and among the owners or possessors of taxable property in the district in the ratio of their several assessments, does not violate any constitutional inhibition, the purpose of the statute being merely to equalize the burden of the new school system upon all the taxpayers of the town.

The word "election" in section 354 of the Education Law, as well as the method prescribed for such election, is not an "election" within the meaning of section 2 of article X of the State Constitution which provides the method by which certain county, city, town and village officers shall be selected, etc., but is simply the equivalent of an appointment by the boards of education of the town jointly assembled for that purpose and said section 354 will not be held unconstitutional merely because the legislature made use of the word "election" for what is plainly nothing but an appointment within the meaning of the Constitution.

ACTION to determine constitutionality of Town School Law (Laws of 1917, chap. 328), and to restrain defendants from acting thereunder.

Cohen & Richter (Julius Henry Cohen, of counsel),

David Tepp, for town board of education.

Merton E. Lewis, attorney-general (Sanford W. Smith, of counsel), intervening in behalf of the state.

Frank B. Gilbert, for commissioner of education.

YOUNG, J. The plaintiffs are the trustees of school district No. 8 of the town of Greenburgh. The defendants constitute the town board of education of that town, claiming to be such under the provisions of chapter 328 of the Laws of 1917. The plaintiffs seek in this action a determination of their rights and duties, a decree of this court that the law in question is unconstitutional and in violation of section 1 of the Fourteenth Amendment to the United States Con-

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stitution; section 1 of article 9, and section 2 of article 10 of the Constitution of this state, and that the defendants be restrained from exercising any powers under that act and from taking over the school property of the district and levying or collecting any tax, etc.

The purpose of the act in question seems to be to re-organize the rural school districts into a town school system with a single town board of education instead of separate boards in each of the several districts of the towns. Defendants assert that this legislation was enacted upon the recommendation of the state department and the regents of the university, and that it is a great advance in the solution of the problem of rural education. It provides for the creation of a town board of education in each town with certain exceptions, to which I shall refer hereafter, and similar boards in certain union free school districts, the qualification of members of such board, appointment of officers, their powers and duties, etc. Such boards are made bodies corporate and are given full control and management of the school and school property, the levy and collection of taxes for school purposes, etc. The act contains the following provision:

"§ 331. *Town board of education.* 1. A town board of education in each town of the state, having jurisdiction over all the schools in the town as hereinafter provided, except in union free school districts having a population of fifteen hundred or more or employing fifteen teachers or more at the time this act takes effect, and the school districts in the several towns of a county which adjoins a city having a population of one million or more and in which there are only two district superintendents, is hereby established to begin on the first day of August, nineteen hundred and seventeen."

It is contended by plaintiffs that this section violates

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the provisions of the Fourteenth Amendment to the United States Constitution in that it unlawfully discriminates against the citizens of Westchester county and denies to them the equal protection of the laws, because the exception contained in this section, of the school districts in the towns of a county adjoining a city having a population of one million or more, and in which there are *only* two district superintendents, was intended, and can only apply to Nassau county, is purely arbitrary and unreasonable and unfairly discriminates against the towns of Westchester county.

I understand it to be conceded that this exception can only affect Nassau county, and we may assume that that was the legislative intent. Could the legislature enact a law reorganizing and consolidating the rural school system in towns and except from its provisions the towns of Nassau county without violating the constitutional provision in question; or was it obliged to include all rural communities in the state, or at least include in any exception all counties which apparently were, or might be, claimed to be of a similar nature with respect to wealth, population and their proximity to a large city like New York? It seems to me that this is a matter over which the legislature has full control. It is not for the courts to determine whether the legislative reason for the exclusion of one county from the provisions of the act and the inclusion of another, apparently similarly situated, is good or bad. To attempt such a review opens a wide field of pure speculation. To the legislature has been intrusted power to provide "for the maintenance and support of a system of free common schools, wherein all the children of this State may be educated" (N. Y. State Const. art. 9, § 1); and it is clearly within its province to provide the necessary legislation to accomplish that purpose. Clearly, this constitutional provi-

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sion does not require it to provide the same system and organization for each locality in the state. On the contrary, it is within its power to provide such a system or systems as will meet the special needs of each locality, and its classification is not the subject of judicial review. What the real purpose of legislation was in excepting Nassau county from the benefit of this act we may only surmise, conjecture or speculate upon. The court cannot know. Unless, however, some right of person or property is invaded by reason of this so-called discrimination, some liberty of person or action interfered with, property taken or vested right destroyed, its action is beyond the review of the courts. Clearly, the inhabitants of one portion of the state have no vested right to have the same kind of school system as those of another portion, and, therefore, no personal liberty or liberty of action to attend the schools of the state is unlawfully interfered with. No school property or vested right in school property is taken or destroyed, for such school property is still in the people and is merely transferred to and held by a new board in trust for school purposes.

I have been unable to find any case in this state where any such constitutional question has been presented. I do not think the cases cited by plaintiffs' counsel are applicable here. The case of *Matter of Henneberger*, 155 N. Y. 420, involved a very different constitutional provision. There the legislature attempted by general language to provide for the construction of highways in a particular locality and the court held that although the language was general in form its purpose was plainly to evade the constitutional mandate that the legislature should not pass a private or local bill laying out highways. In that case the legislature sought by an act general in form to affect a particular locality, contrary to the constitu-

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tional provision. Here, on the contrary, the legislature has passed a general act providing for a general school system in rural communities affecting all such communities, with the exception of those contained in one county. There is no inhibition against their making such an exception in our state Constitution similar to that violated by the act under review in the *Hennebergerger* case.

Nor do I think that the numerous cases cited by plaintiffs' counsel involving the construction of statutes enacted under the police powers of the legislature have any application. I do not think that the legislative authority over our school system is comprehended within the definition of the police powers of the state as that term is usually understood. Ordinarily that term includes the power of the legislature to enact such legislation as may be necessary to preserve public health, protect the public morals, and provide for public safety, and it is well settled that such powers must be so exercised that statutes enacted thereunder have some reasonable connection with the public welfare and apply without discrimination to all persons comprehended in the subject matter of the act; although, even in the regulation of such matters, it has been held that the legislature is authorized to apply the act to certain portions of the state and except others, and that such application will involve no violation of the Fourteenth Amendment of the United States Constitution. See *People* v. *Havnor*, 149 N. Y. 195. The court in that case said: "That amendment does not relate to territorial arrangements made for different portions of a state, nor to legislation which, in carrying out a public purpose, is limited in its operation, but within the sphere of its operation affects alike all persons similarly situated."

I am therefore convinced that those provisions of

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the statute under discussion constitute a valid exercise by the legislature of its power to provide a school system, and that it violates no constitutional provision.

Plaintiffs also attack the following provision of the act:

"§ 354. *Election of board of education.* 1. The first board of education of each town thereof shall be elected by the trustees and members of the boards of education of the several school districts in such town, subject to the provisions of this article. The said trustees and members of boards of education shall meet for such purpose on the second Tuesday in June, nineteen hundred and seventeen, in one of the school-houses in the town to be designated by the district superintendent of schools. The said trustees and members of boards of education shall organize by the election of a chairman and clerk. They shall thereupon proceed to elect members of the board of education of the town to hold office for the term specified in section three hundred and thirty-one of this article. The persons elected as members of such board shall be residents of the town and qualified electors at school meetings therein. Not more than three of the members of such board of education shall reside in the same school district, except in towns in which there are less than three school districts. The chairman and clerk of the meeting shall canvass the votes cast for the candidates for the offices to be filled and the candidate receiving a majority of the votes cast shall be elected. The chairman and clerk of the meeting shall thereupon notify the district superintendent in writing of the persons declared elected as members of said board, and the district superintendent shall give notice of such election to the persons so elected. As the terms of office of such members expire their successors shall be elected at the annual school meeting.

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"The district superintendent of schools shall call a meeting of the board of education of each town in his supervisory district, elected as above provided, on the first day of August in nineteen hundred and seventeen, at the principal schoolhouse of the town, for the purpose of organization and the transaction of any other business which may properly come before such board. Upon the election of a clerk of such board, the chairman and clerk of the meeting held for the purpose of electing members of the board of education shall file the minutes of the meeting with such clerk."

Plaintiffs contend that this action violates section 2 of article 10 of our state Constitution. That section prescribes the method by which certain county, city, town and village officers shall be selected, and further provides that all other officers whose election or appointment is not provided for by the Constitution, and all officers whose offices might thereafter be created by law, should be elected by the people or appointed as the legislature may direct. The criticism by plaintiffs' counsel is that this statute provides for an election of the first board of trustees not by the people, but "by the trustees and members of the boards of education of the several school districts in such town." On the other hand, it is contended by defendants' counsel that, although the legislature has employed the word "election" in this section of the act, the method actually prescribed was clearly nothing more than an appointment; that as the annual school meeting at which these boards would ordinarily be elected was held prior to the taking effect of the statute it was necessary to provide some method of electing the first board, and that method consisted in what is termed in the act "an election" by the trustees and members of all the several boards of education in the town. The question presented is whether

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the word "election" as used in the section under review, as well as the method prescribed for such election, was an *election* within the meaning of that word employed in the constitutional provision referred to; or was it simply equivalent to an *appointment* by the boards of education of the town jointly assembled for that purpose? If it was an election as distinguished from appointment, this section of the statute cannot be upheld. In determining this question, it is necessary to consider the substance of the statute rather than its mere form. If then, we substitute for the words "elect," "elected" and "election" the words "appoint," "appointed" and "appointment," it could hardly be argued that because the statute prescribed a method of voting it was an election, rather than an appointment. Plainly, the only means by which a board of that character could make an appointment would be by voting. The substitution above referred to neither adds to nor detracts from the substance of the statute. The method pursued and the result obtained are precisely the same, whichever language is employed, and I do not think that a statute should be held unconstitutional merely because the legislature has employed the word "election" for what is plainly nothing but an appointment within the meaning of the Constitution. See *People* v. *Sturges,* 27 App. Div. 387; affd., 156 N. Y. 580; *State Board of Pharmacy* v. *Bellinger,* 138 App. Div. 12. If the method prescribed resulted in an appointment, the legislature was authorized to provide for such appointment either for full terms or temporarily.

The only remaining provisions of this statute attacked are those contained in sections 352 and 353. Section 352 provides, among other things, for an apportionment and distribution by the old trustees of the funds remaining in their hands except state moneys,

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after closing up the financial affairs of the district, among the taxpayers of the district. Section 353 makes the bonded indebtedness for the several school districts affected a charge against property subject to tax for the maintenance of the schools of the town, and provides for an appraisal of school property, a credit to each district of its value after deducting the bonded indebtedness, and an apportionment and distribution of the amount credited to and among the owners or possessors of taxable property in the district in the ratio of their several assessments. The right of the legislature to alter and enlarge towns, villages and school districts, to transfer the public property affected to the newly created town, village or district, and to charge it with the outstanding indebtedness, has never, so far as I have been able to find, been questioned by any decision in this state. This power has been upheld by the United States Supreme Court. *Laramie Co.* v. *Albany Co.*, 92 U. S. 307. In my opinion such transfer of property violates no constitutional provision. No property or property right is taken away. The transfer is simply from one public authority to another, for convenience of administration.

The appraisal, apportionment and distribution among the taxpayers and owners and possessors of taxable property provided by the statute presents a different question. The precise constitutional provision claimed to have been contravened by this portion of the statute is not pointed out by the plaintiffs. Clearly neither the provision of section 1 of the Fourteenth Amendment to the United States Constitution nor section 1 of article IX, nor section 2 of article X of our state Constitution is so violated. Section 10 of article VIII which prohibits a town from giving any money or property to any individual is designed to prevent the application of public moneys to private uses. The right of the legislature to dis-

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tribute these moneys and property to taxpayers, even for the purpose of equalization, is not entirely clear. I know of no similar statute in this state nor of any decision of our courts involving this precise question. In New Jersey a similar statute was held unconstitutional as devoting public funds to private use. *State ex rel. Elizabethtown Water Co.* v. *Wade,* 59 N. J. L. 78. On the other hand, similar statutes have been upheld in Massachusetts and Rhode Island. *Whitney* v. *Stow,* 111 Mass. 366; *Matter of Town Council of Cranston,* 18 R. I. 417; *Matter of School Committee, Town of Johnston,* 19 id. 279; *Matter of Cumberland,* 21 id. 576; *Matter of North Smithfield,* 26 id. 164; *Tefft* v. *Lewis,* 27 id. 9. These latter decisions in effect hold that where the purpose of such a statute is merely to equalize the burden of the new school system upon all the taxpayers of the town it does not violate any constitutional inhibition and will be upheld. My own opinion accords with this view. It seems to me only fair that the burden of this new system should be equitably apportioned among the several school districts of the town so as to secure equality as far as possible, and I know of no better way to accomplish this purpose than as provided in the statute. The criticism that it results in the payment to present taxpayers who personally made no contribution to the fund now sought to be distributed is unsound, and ignores the fact that whatever taxes were levied for school purposes were levied against property and not against the individual owners at the time and that it is the same property which is now sought to be relieved of an undue burden by the equalization provided for.

I therefore decide that the provisions of the statute in question are constitutional and valid.

Judgment accordingly.

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Matter of the Application of EDWARD F. BOYLE and Others, Constituting the Board of Elections for the City of New York, for a Writ of Mandamus against FRANCIS M. HUGO, Secretary of State.

(Supreme Court, Albany Special Term, December, 1917.)

Election Law — amendment of section 513 — board of elections — statutes — disposition by secretary of state of official war ballots — Laws 1917, chap. 815, § 5.

Mandamus — application for peremptory writ denied — to compel secretary of state to transmit war ballots.

The statute (Laws of 1917, chap. 815, § 5), amending section 513 of the Election Law with respect to the disposition by the secretary of state of the official war ballots in his custody which have been voted in the recent election by the soldiers and sailors in the United States service in the present war, being silent as to when the secretary shall transmit said ballots to the boards of elections, leaves him with a wide discretion as to when he shall make such transmission, provided he transmit the ballots in time to have them properly canvassed.

Where, upon an application for a writ of peremptory mandamus to compel the secretary of state to forthwith transmit to the various counties in the city of New York the official war ballots above mentioned, it appears that all of such ballots have not yet been received by him and that it is his purpose to transmit all such ballots as soon as he can, not later than December 7, 1917, and it also appears that he has voluntarily furnished to the board of elections in New York city an unofficial tabulated statement containing all the information indorsed upon the envelopes containing such ballots, and it is not shown that he has omitted to discharge any duty imposed upon him by law in respect to them, the application will be denied.

APPLICATION for a peremptory writ of mandamus.

Lamar Hardy, corporation counsel, and George P. Nicholson, assistant corporation counsel, for relators.

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Merton E. Lewis, attorney-general, and Arthur E. Rose, deputy attorney-general, for defendant.

CHESTER, J. The relators by this application seek a peremptory writ of mandamus to compel the secretary of state to transmit forthwith to the various counties within the city of New York the official war ballots in his custody, some 30,000 in number, which have been voted in the recent election by soldiers and sailors in the United States service in the present war and which have been transmitted to him.

The claim of the relators is that it is necessary that these official war ballots be now transmitted to the board of elections in New York in order that it may, as required by law, separate the ballots among the various election districts so that the election officers in the various polling places may be convened for the purpose of making a proper canvass of such ballots on December eighteenth, next. By the secretary's return it appears that all of the ballots voted by soldiers and sailors of the United States at the recent election have not yet been received by him, and that it is his purpose to transmit all ballots as soon as he can do so, and not later than December seventh. It also appears that he has voluntarily furnished to the board of elections in New York an unofficial tabulated statement containing all the information indorsed upon the envelopes containing such ballots, so as to facilitate the board of elections in performing the duties incumbent upon it under the law.

The amendment to the Election Law in relation to voting by soldiers and sailors and the canvass of war ballots, passed at the extraordinary session of the legislature in 1917 (Laws of 1917, chap. 815), makes provision in section 5, which amends section 513 of the Election Law, with respect to the disposition of

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such envelopes and ballots and fixes the duty of the secretary of state concerning them. Section 513 as amended provides among other things that the secretary of state shall prepare from the poll books delivered to him by the governor and from the envelopes containing the ballots a separate statement for each county under his official seal, in which shall appear all the information required by law to be entered in such poll books concerning the voters' residence in their respective counties. It also provides that the secretary "shall affix his seal of office to each such envelope and shall transmit such statement with all the envelopes containing ballots of such voters resident in such county" to the respective boards of elections in the counties of the state. The statute also makes it incumbent upon the board of inspectors in any election district wherein any such ballots are to be canvassed to convene at the place where the election was held on the sixth Tuesday after the election day at ten o'clock in the forenoon to canvass such votes. The sixth Tuesday after the recent election falls on December eighteenth. The statute is silent as to *when* the secretary shall transmit these ballots to the boards of elections, but it is clear from the law that they must be transmitted in time to have the respective boards of elections perform the duties incumbent upon them, prior to the time when the several boards of inspectors in the election districts are required to canvass the votes. Manifestly the secretary cannot transmit the ballots until they are received, and it is conceded that all have not yet been received, but their receipt is expected within a day or two or within a few days. The statute has left a wide discretion in the secretary of state as to when he shall make such transmission, providing, of course he transmits the ballots in time to have them properly

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canvassed. It may be that the reason why the legislature failed to fix the time in the statute when the secretary should transmit the ballots was caused by the fact that they are cast by soldiers and sailors in various parts of the world and on various vessels on the sea, remote from this state, and that the time of their return would necessarily be uncertain. The secretary has furnished all the information to the relators in this case that they would have if the envelopes containing the ballots were in their hands. This includes the number of the elector, his name, his residence, including the street and number, if any, his county, his city or town and the designation of his command. This information has been furnished in an effort to aid the relators in the prompt discharge of the duties incumbent upon them and not because the secretary was required to furnish it by any provision of the statute. It cannot be assumed that the secretary would delay the transmission of the ballots to so late a date as to defeat the purpose of the law.

It is well settled that mandamus will not lie except to compel the discharge by a public officer of a duty clearly imposed upon him by law nor can a discretion reposed in an official be controlled by mandamus. No authorities need be cited in support of these elementary principles. The secretary being clearly charged with the exercise of a discretion, as I have pointed out, in respect to the time when he should transmit these ballots and it not having been shown that he has yet omitted to discharge any duty imposed upon him by law in respect to them, this application must be denied.

Application denied.

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Matter of the Application of ST. GEORGE HARVEY for a Peremptory Writ of Mandamus against EDWIN DUFFEY, Commissioner of Highways of the State of New York.

(Supreme Court, Albany Special Term, December, 1917.)

Mandamus — when application for peremptory writ granted — contracts — corporations — negotiable instruments — Highway Law, § 130 (3).

Where, upon an application for a peremptory writ of mandamus to compel the commissioner of highways of the state to return a certain draft deposited with him by a foreign corporation not authorized to do business in this state at the time of the submission of its bid as sole bidder for the construction of a certain state highway, it appears that the commissioner had declined to award the contract to said company unless its bid was reduced to the engineer's estimate, which said corporation declined to do and in writing requested the return of said draft, and the commissioner about a month after declining to return the draft advised the corporation that it had been awarded the contract for the amount of its bid, the application will be granted on the ground that said commissioner had no right at any time, under section 130(3) of the Highway Law, to let the contract either to the corporation or to the assignee of its bid except for the amount specified in the engineer's estimate, or for a less amount.

APPLICATION for peremptory writ of mandamus.

Parsons & McClung, for applicant.

Merton E. Lewis, attorney-general, and Edmund H. Lewis, deputy attorney-general, for respondent.

CHESTER, J. The petitioner, St. George Harvey, by this application seeks a peremptory writ of mandamus to compel the respondent, as commissioner of highways of the state of New York, to return a certain

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draft for $7,320, which was deposited with the respondent by the Kennedy Construction Co., Ltd., at the time of submitting a bid or proposal for the construction of a certain state highway.

An application for a like writ for the return of the same draft was heretofore made by said, the Kennedy Construction Co., Ltd. That application was denied and on an appeal to the Appellate Division by that company the order denying the application was affirmed on the ground that its interest in the draft had been assigned by the Kennedy Construction Co., Ltd., to said St. George Harvey and for that reason that the then applicant had no interest in the subject matter involved.

This application is now made for the return of the same draft by said St. George Harvey so that the reason for the former denial of the writ has now been eliminated.

It appears that in the fall of 1916 said state commissioner of highways advertised in pursuance of the Highway Law for bids for the improvement of certain highways in the state, among which was what was known as state highway No. 5637 in Washington county, the one in question on this application. The Kennedy Construction Co., Ltd., submitted a bid for the work on the 20th day of November, 1916, and accompanied the bid by the draft in question, being substantially five per cent. of the amount of the pro posal. The proposal submitted contained, as required by law, an itemized statement of the various kinds of work proposed to be done, the prices for each item and the gross sum bid for the entire work which was $146,240. The estimate sheet made for the construction or improvement of this highway by the state highway department as required by law and given out as information to the bidders was itemized, with a

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statement of the estimated quantity and price of each item and aggregated the sum of $146,127.50 for the cost of the work. On such sheet there was added to the cost of the work for engineering, advertising, etc., the sum of $12,172.50, making the total cost $158,300. It will be seen that the amount of the proposal was $112.50 more than the estimated cost of the work, not including the expense for engineering, advertising, etc. On November 21, 1916, the bids submitted for the improvement of the various highways were opened at the office of the state commissioner of highways in Albany and it was found that the Kennedy Construction Co., Ltd., was the sole bidder for the construction of said road No. 5637, Washington county. The state commissioner of highways declined to award the contract to said company unless its bid was reduced to the engineer's estimate of $146,127.50. The company declined to reduce this bid and in writing requested the return of the draft which accompanied the bid. The state commissioner of highways declined to return the draft. About a month thereafter the commissioner advised the company that it had been awarded the contract for the amount of its bid, viz., $146,240.

The Kennedy Construction Co., Ltd., was a foreign corporation organized and existing under the laws of the Dominion of Canada and it was never authorized to transact business in the state of New York, pursuant to the provisions of the corporation law. On or about the 16th day of February, 1917, it assigned to said St. George Harvey, the applicant here, its bid or proposal and the right to enter into a contract with the state, as well as all moneys due or which might thereafter become due thereon together with all right, title and interest of such company in the same. Under such assignment said St. George Harvey was requested by the state commissioner to execute a con-

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tract to do the work in question but he has not done so and he now brings this proceeding to recover the draft in question.

It is practically conceded that the state commissioner of highways had no right under the law to award this contract to the Kennedy Construction Co., Ltd., as it was not authorized by law to transact business within this state and the Highway Law in subdivision 3 of section 130 (Laws of 1909, chap. 30) provides that no contract for the construction or improvement of a highway or section thereof "shall be awarded at a greater sum than the estimate made for the construction or improvement of such highway or section thereof in accordance with such plans or specifications." It is now insisted by the respondent, contrary to the view entertained by him at the time the bid of the Kennedy Construction Co., Ltd., was not accepted unless it was reduced to the engineer's estimate of $146,127.50, that the estimate of the cost of construction also includes the $12,172.50, the expense of engineering, advertising, etc., and therefore that the respondent had the right to award the work under the proposal submitted and that such award would not be in violation of the section of law referred to. That attitude requires the construction of the statute mentioned, to ascertain the meaning of the above quotation from the statute. The meaning appears to me plain when the provision is examined in the light of other provisions of the Highway Law. Section 125 of such law provides in substance that whenever the state commissioner shall have determined upon the construction or improvement of a state highway or section thereof, he shall direct the division engineer of the division wherein such highway or section thereof is situated to make surveys and prepare suitable preliminary maps, plans and specifications. In

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subdivision 9 of said section 125, it is provided that the division engineer "shall cause an estimate to be made of the cost of the construction of such highway or section thereof in accordance with such plans and specifications. In making such estimate he shall ascertain with all practical accuracy the quantity of embankment, excavation and masonry, the quantity of all materials to be used and all items of work to be placed under contract and specify the estimated cost thereof."

The clear purpose of this provision is that the engineer's estimate shall furnish information to and serve as a guide for a proposed bidder as to the *quantity* of the work of various kinds to be done and with respect to the materials to be furnished. It also advises the bidder what the engineer acting for the state deems to be a fair price therefor. The bidder is not concerned in any way with the amount of the cost for engineering, advertising or other incidentals entering in the total cost nor is he asked or permitted to bid on these items.

The prohibition contained in subdivision 3 of section 130 above referred to is that no contract shall be awarded at a greater sum than the *estimate* made for the *construction or improvement* of such highway or section thereof *in accordance with such plans and specifications*. There is nothing in this having any reference whatever to the added expense of engineering, advertising, etc., which may be incidental to the work in question, and the estimate that was furnished to the bidders and the estimate referred to in the law it seems to me is clearly one having reference solely to the cost of the work called for by the plans and specifications. It seems to me that the view taken by the defendant at the time it refused to award the contract upon this bid unless it was reduced to the esti-

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mate was the correct one and therefore that the respondent had no right at any time under the law to let this contract either to the Kennedy Construction Co., Ltd., or to the petitioner, except for the amount specified in the estimate or for a less amount, and that he was and ever since has been under a statutory prohibition of letting it at a greater sum.

The negotiations appearing in the record made by this applicant with the state commissioner of highways subsequently to the assignment to him, with a view of having this contract let to him before he finally refused to enter into it, might be regarded as a consent on his part to take the contract in question at the small increased sum and a waiver of his right to have the draft returned, but, if the respondent was under a legal prohibition from letting this contract at any higher figure than that stated in the engineer's estimate, that can make no difference here.

The application should be granted, with fifty dollars costs and disbursements.

Application granted, with costs and disbursements.

THE PEOPLE ex rel. ANTONIO DELESANDRO, Petitioner, *v.* JESS HOVER, Sheriff of Broome County.

(Supreme Court, Broome Special Term, December, 1917.)

Liquor Tax Law, §§ 30-P, 37(1) — violation of — indictments — misdemeanor — fines — "Bone Dry Law" — Laws of 1917, chaps. 623, 814.

One charged with a violation of section 30-P of the Liquor Tax Law, as amended by the "Bone Dry Law" (Laws of 1917, chaps. 623, 814), must be prosecuted by indictment and trial in a court of record as provided by section 37(1) of the Liquor Tax Law, though upon conviction he is punishable under section 36(2) of the Liquor Tax Law by a fine of not

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more than $500, or by imprisonment in a county jail or penitentiary for a term of not more than one year, or by both such fine and imprisonment.

A Police Court, being a Court of Special Sessions, has no jurisdiction to render a judgment of conviction in such a case though defendant pleads guilty to the charge, and he must be discharged on habeas corpus.

WRIT of habeas corpus to inquire into the cause of detention of the relator in the Broome county jail.

Harrison & Clark, for petitioner.

U. S. Lyons, district attorney, for sheriff of Broome county.

DAVIS, J. The relator was convicted in the Police Court of the village of Endicott for a violation of subdivision P, section 30 of the Liquor Tax Law, as amended by chapters 623 and 814 of the Laws of 1917, commonly known as the "Bone Dry Law."

The particular charge against him was that on November 30, 1917, he brought into the town of Union, Broome county, two and one-half barrels of ale and two and one-half barrels of lager beer. Trafficking in liquors is prohibited in the town of Union by reason of the result of a vote on the questions submitted under the provisions of the Liquor Tax Law relating to local option.

It is claimed on behalf of the relator that, although he pleaded guilty to the charge before the police magistrate, the conviction is illegal because Courts of Special Sessions do not have jurisdiction of this crime.

There seems to be considerable doubt in the minds of many magistrates in similar courts as to whether or not they have jurisdiction in such cases. It is sometimes difficult for the lay mind to understand and interpret the somewhat complex and confusing pro-

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visions of the Liquor Tax Law; and because it seems not to have been heretofore judicially determined, perhaps it would be in the public interest that the question of such jurisdiction should be plainly stated and settled in this or the appellate courts.

It is necessary to consult three different sections of the law to learn where jurisdiction lies. Section 37 provides, so far as it is applicable here, as follows: "1. Except as otherwise provided by this chapter, all proceedings instituted for the punishment of any violation of the provisions of this chapter, the penalties for which are prescribed in subdivisions one, two, three or four of section thirty-six, shall be prosecuted by indictment by the grand jury of the county in which the crime was committed, and by trial in a court of record having jurisdiction for the trial of crimes of the grade of felony. * * * 2. Courts of special sessions shall have exclusive jurisdiction to try and determine, according to law, all violations of the liquor tax law defined by subdivision five of section thirty-six as a misdemeanor. Any person convicted in a court of special sessions for violation of any of the provisions of this chapter shall be punished according to the provisions hereof."

Section 36, subdivision 2, provided, so far as is applicable here, as follows: "2. Any person * * * who shall violate any of the provisions of section eight, nineteen, twenty, twenty-one, twenty-three, twenty-nine or thirty shall be guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not more than five hundred dollars or by imprisonment in a county jail or penitentiary for a term of not more than one year, or by both such fine and imprisonment."

The relator, as already stated, was convicted of a violation of section 30, subdivision P. Therefore, the

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penalty was prescribed in subdivision 2 of section 36 just quoted, and it was mandatory that his prosecution should be by indictment and by trial in a court of record, as provided by section 37, subdivision 1.

The Court of Special Sessions had no jurisdiction other than to conduct an examination and admit the relator to bail or to commit him to the custody of the sheriff if it appeared on such examination that there was sufficient cause to believe him guilty.

The judgment of the court convicting him was therefore invalid; and it needs a valid one lawfully to detain him. *People ex rel. Stokes* v. *Riseley,* 38 Hun, 280; *People* v. *Carter,* 48 id. 165.

Where there was no jurisdiction of the offense, the relator could confer none by consent or by his plea of guilty. *People ex rel. Lotz* v. *Norton,* 76 Hun, 7; 12 Cyc. 222.

It is undoubtedly more important to those charged with the duty of enforcing this law than it is to the relator in this instance, that such substantial violations of the law as admittedly occurred here be punished in courts having ample jurisdiction and power to impose all or any part of the somewhat severe penalties provided for such violations. The powers given to Courts of Special Sessions are limited. Code Crim. Pro. § 56. The intent of the legislature is clear that the enforcement of this law should not be interfered with by the lack of sufficient jurisdiction or by any other difficulties that beset the prosecution of crimes in Courts of Special Sessions, where conviction may mean serious punishment.

Because the Police Court had not jurisdiction to render final judgment of conviction and issue a valid commitment, the relator must be discharged.

Ordered accordingly.

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THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v. MAURICE ROSE, Defendant.

(Court of General Sessions of the Peace in and for the County of New York, December, 1917.)

Indictment — when motion to dismiss, denied — evidence — motions and orders — divorce — depositions — criminal law.

Where, upon a motion made after the inspection of the grand jury minutes to dismiss an indictment charging that defendant conspired with certain persons, naming them, to prevent the due course of law and justice and to give and cause to be given false testimony in a divorce action then pending in the courts of a sister state, and the indictment sets forth certain overt acts alleged to have been committed to effect the object of the conspiracy, and the evidence though failing to disclose concerted action between all the parties named does show concerted action between defendant and one or more of the other parties, the motion will be denied.

The act of one of said persons in making a false deposition before a commissioner appointed by the court in which the divorce action was pending not being the ultimate object of the conspiracy, there was no merger thereof in the felony committed by the one making the false deposition.

MOTION made after an inspection of the grand jury minutes to dismiss an indictment for conspiracy returned against the defendant only, which was filed on the 29th day of June, 1917.

Max D. Steuer, for motion.

Edwin P. Kilroe, deputy assistant district attorney, in opposition.

NOTT, J. The indictment, after alleging that prior to the 3d day of July, 1914, there was pending in one of the District Courts of the state of Minnesota an

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action by this defendant against Bertha Rose, his wife, to procure a divorce on the ground of adultery and cruel and inhuman treatment, proceeds to allege that the defendant conspired with Charles Baker, Louis Baker, David A. Shook, William Scheiler, Samuel Schleman and Lester L. Roos, to prevent the due course of law and justice and to give and cause to be given false testimony in the said action then pending in the state of Minnesota. The indictment then sets forth certain overt acts alleged to have been committed to effect the object of the conspiracy, namely, the procurement of a false affidavit from Scheiler, a similar one from Edward Shork; the leaving of this state by the defendant and his going to the state of Minnesota, and there filing the said affidavits, and the causing and procuring of Scheiler, Schleman, Roos and Shook to make false depositions before a commissioner appointed by the District Court of Minnesota to take testimony in the divorce action.

The defendant now moves to dismiss the indictment upon the grounds that the overt acts are not such as to effect the objects of the conspiracy and that the overt acts were not proved to have been committed in the course of the conspiracy between the defendant and the people who committed the acts.

It must be kept in mind that if the testimony proved one overt act and the conspiracy between the defendant and one other person, the motion cannot be granted even though all the alleged overt acts were not proved and a conspiracy was not proven between the defendant and all the persons named as conspirators. *People* v. *Everest,* 51 Hun, 19. If this indictment had been found against all of the alleged conspirators, it is very likely that the proof might fail to show that some of them were parties to the conspiracy; but the indictment is against the defendant alone, alleging his

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conspiracy with several others and if the proof shows that he conspired with one other it is sufficient. In my opinion the procuring of the affidavits of Shook and Scheiler constituted overt acts, even though the affidavits would not have been made the basis of an indictment for perjury. *People* v. *Sheldon*, 139 N. Y. 251.

While the point is well taken that the evidence fails to disclose concerted action between all of the parties named, in my opinion it does disclose concerted action between the defendant and one or more of them.

As to the point made that the deposition of Shook before the commissioner was not an act done toward the effecting of a crime, but is of itself the consummated felony, that contention would be sound did the indictment allege that the object of the conspiracy was merely to procure the false deposition of Shook. The indictment, however, alleges that the object of the conspiracy was to obstruct the due course of law and justice in the action in the state of Minnesota, and the causing of false testimony to be given in the said action. The act, therefore, of Shook not being the ultimate object of the conspiracy, I do not think there is a merger of the conspiracy in a felony committed by Shook. See *People* v. *Petersen*, 60 App. Div. 118.

For the reasons above stated the motion to dismiss the indictment is denied.

Motion denied.

Matter of the Probate of the Last Will and Testament of JOHN H. COGAN, Deceased.

(Surrogate's Court, Bronx County, December, 1917.)

Wills — loose pages — attestation clause — statutes — witnesses — testamentary capacity.

An instrument offered for probate as a last will consisted of three sheets of paper not fastened together but so arranged

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that the page containing the date of the document was before that containing the signature of the testator and after that came the third page containing a clause which was not an attestation clause in the accepted sense of that term signed by the subscribing witnesses, and as so arranged the several sheets were folded and placed in an envelope. On the hearing of the petition for probate the facts of testator's testamentary capacity and that he declared the instrument to be his last will were fully established. The clause subscribed by the witnesses was dated and signed seventeen months after the date of the will, they signing the same in testator's presence and with his acquiescence after the will and said clause had been read to him. *Held*, that the statute having been substantially complied with, probate will be decreed.

PROCEEDING upon probate of a will.

McCabe & Hickey, for petitioner.

Robert A. B. Dayton, for respondent.

SCHULZ, S. The petition in this matter recites that the decedent left him surviving as his heirs at law and next of kin four cousins, three residing in Ireland and one in the city of New York. The propounded document consists of three sheets of paper, two of them similar in size, texture and appearance. The third is smaller in size, differs from the first two in texture and appearance, and contains the clause which the witnesses to the alleged will have signed and which is as follows:

"Fordham Hospital, 4/9/17. To whom it may concern: This is to certify that Mr. John H. Cogan, in sound mind, identified his cousin Mary Cullin as the one to whom he bequeathed his estate as specified in his last will dated Nov. 1st, 1915. Witnesses: Philip R. Zinn, M. D. Helen Hannigan."

It will be observed that it is not an attestation clause

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in the accepted sense of that term. The three sheets of paper of which the instrument consists were not fastened together, but the testimony is that they were arranged in the following order, that is to say, the page containing the date of the document, behind that the page containing the signature of the testator, and after that the third page containing the clause above quoted and the signatures of the witnesses, and as thus arranged they were folded and placed in an envelope. The contestants are the three cousins in Ireland. Their contentions urged by counsel are (a) that the decedent did not intend to make a will on the 9th day of April, 1917, when the witnesses signed; (b) that the decedent did not acknowledge his signature to the witnesses with the signature visible to them; (c) that there is no proof of any request on the part of the decedent to the witnesses to sign the instrument as witnesses, and (d) that the paper signed by the witnesses was not a part of the will of the decedent. It is undisputed that all of the alleged will down to and including the signature of the deceased is in his handwriting, and while the fact that the instrument is a holograph does not dispense with a substantial compliance with the formalities of execution prescribed by statute (Decedent Estate Law, § 21, being Laws of 1909, chap. 18, and constituting Consol. Laws, chap. 13), the authorities lean to the view that evidence of publication need not be as strong in such a case. *Matter of Akers,* 74 App. Div. 461; affd., on opinion below, 173 N. Y. 620; *Matter of Beckett,* 103 id. 167; *Matter of Hunt,* 110 id. 278. The evidence offered to show that the decedent was of sound mind, memory and understanding and over twenty-one years of age, and that he declared the said instrument to be his last will and testament, is not controverted, impeached or questioned, and I deem these facts fully established.

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Under the terms of the document the decedent's property, with the exception of wearing apparel, is bequeathed to the cousin who resides in the city of New York. There is no allegation or intimation that it is the result of fraud, duress, undue influence or restraint. I am satisfied that it expresses fully the intention of the testator and that it is natural in its terms. There is no evidence before me as to when the paper was signed by the decedent. It is dated November 1, 1915, and was presumably signed at that time. The clause subscribed by the witnesses is dated and was signed on April 9, 1917. It is not open to doubt that at the time when the instrument was subscribed by the decedent he intended to make his will. That intention continued until it was carried out or was abandoned. There is no evidence of abandonment, and if it was not carried out and not abandoned it must still have existed on the 9th day of April, 1917, when the witnesses signed. The mere fact that this occurred over seventeen months thereafter is immaterial. I know of no case which holds that the document must be published and witnessed at the time of the subscription by the testator, and the provision of the statute to the effect that the signature shall be made by the testator in the presence of each of the witnesses or "shall be acknowledged by him, to have been so made, to each of the attesting witnesses" is clearly to the contrary. Nor does the statement in the clause as to the identity of the legatee warrant a presumption, in the face of evidence to the contrary, that the witnesses signed only to establish such identity. Their signing for that purpose was unnecessary. I therefore reach the conclusion that the decedent did intend to make a will on the day when the witnesses signed. The evidence that the decedent acknowledged his signature to both witnesses is conclusive. It is also clear that one of the witnesses saw

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his signature. The testimony of the other witness on this point is uncertain, but she testifies that she was within two feet of the bed upon which the decedent was lying when he acknowledged his signature and that she could have seen it; and while she stated that the paper was folded she subsequently modified this by saying that at some time during the occasion in question the paper was unfolded, and finally that she did not know whether she looked at the signature or not. Under such circumstances the Appellate Division has held that there is a substantial compliance with the statute. *Matter of Akers, supra.* See, also, *Matter of Laudy,* 161 N. Y. 429. There is no direct testimony that the decedent in words requested the witnesses to act and sign as such. The document, including the clauses signed by them, and which described them as witnesses, however, was read to the decedent and he nodded his assent. They were at his bedside at the time. They signed in his presence and with his acquiescence. It appears evident to me that as between the testator and the witnesses there was a meeting of the minds upon the understanding that the instrument was the testator's will; that it had been subscribed by him and that the attestation of the witnesses to the will so subscribed was desired. This constitutes a substantial compliance with the statute. *Matter of Turrell,* 166 N. Y. 380. No precise form of words addressed to the witnesses is required. *Coffin* v. *Coffin,* 23 N. Y. 9; *Gilbert* v. *Knox,* 52 id. 125. The last contention urged, namely, that the script signed by the witnesses is not a part of the propounded document, is, in my opinion, the most serious. If the three sheets had been fastened together, no difficulty would present itself, for the mere fact that the clause quoted above is between the signature of the decedent and those of the witnesses is of no more importance than if it had been a

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regular attestation clause. In that event, the place of the signatures of the witnesses would have satisfied the statutory requirements. *Williamson* v. *Williamson*, 2 Redf. 449; *Matter of Beck*, 6 App. Div. 211; affd., on opinion below, 154 N. Y. 750. The danger of permitting witnesses to sign upon an unattached sheet of paper is of course apparent, but not necessarily fatal to the probate. *Matter of Snell*, 32 Misc. Rep. 611; *Matter of Fitzgerald*, 33 id. 325. In view of the testimony as to the arrangement and folding of the various sheets comprising the instrument in question, and the absence of any allegation or intimation of fraud, I am of the opinion that the document should be considered as though the three sheets had been fastened together. If thus regarded, the paper signed by the witnesses was a part of the propounded document and the signatures of the decedent and the witnesses are not only at the physical end, but also at what has been variously termed the "literary," "natural," "logical," "speaking" and "constructive" end. It follows that the instrument should be admitted to probate and it will be so decreed. Costs will be allowed to the proponent, payable out of the estate.

Probate decreed.

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WILLIAM DINNEBEIL, Appellant, *v.* FREDERICK C. RINGER, as Property Clerk of the Police Department of the City of New York, Respondent.

(Supreme Court, Appellate Term, First Department, December, 1917.)

Money had and received — action for — who has legal title to proceeds of stolen property — Greater New York Charter, §§ 331–336 — evidence — criminal law.

A thief has the legal title to the proceeds of a sale of property stolen by him.

Upon the arrest of one who had stolen certain jewelry, the proceeds of a sale thereof upon being taken from his person were turned over to defendant, as property clerk, pursuant to sections 331–336 of the Greater New York Charter, the thief confessed, pleaded guilty to a charge of grand larceny in the first degree, the stolen property was returned to the owner but the purchasers from the thief took no action for the protection of any rights they might possibly have. *Held,* that upon the facts it was error to dismiss the complaint in an action for money had and received brought by the assignee of the thief to recover the money turned over to defendant as property clerk.

That under a separate defense, that defendant was required to hold the money in question to be used as evidence in certain criminal proceedings which were pending and undetermined, he was entitled to show that the certain persons proceeded against are the purchasers of the stolen property, the convicted thief, or even other persons for other crimes, and that, upon proof of such facts, plaintiff could not recover though the holder of the legal title to the money.

That declarations of plaintiff's assignor made subsequently to the assignment of the money in question, as to his right to the proceeds of the sale of the stolen property, were inadmissible.

APPEAL by plaintiff from a judgment of the City Court of the City of New York, dismissing the complaint at the close of plaintiff's case.

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David Schneir (David Weiss, of counsel), for appellant.

Lamar Hardy, corporation counsel (Terence Farley and William E. C. Mayer, of counsel), for respondent.

PHILBIN, J. It appears that one Van Gulick stole some jewelry and then sold it to certain persons and was later arrested. The sum of $1,250 was taken from his person and turned over to the defendant as property clerk, pursuant to the provisions of the Greater New York Charter (§§ 331–336). The money was the proceeds of the sale of the stolen property. Van Gulick is now in prison, having confessed to the theft of the jewelry and pleaded guilty to grand larceny in the first degree. The stolen jewelry has been returned to the owner. The purchasers have not yet taken any action for the protection of any rights they may possibly have. Van Gulick has by mesne assignment transferred to the plaintiff whatever claim he may have to the said proceeds. After demand for the money was made upon the defendant, plaintiff brought this action for money had and received. At the close of plaintiff's case, the above facts appearing, the complaint was dismissed.

The plaintiff made out a *prima facie* case. It seems to be the law that a person who steals property and then sells it gets legal title to the proceeds. *Warren* v. *Haight,* 65 N. Y. 171, 177, 178. For that reason, it was error to dismiss the complaint and defendant should have been put to his proof. I do not think, however, that this court should remit this case for retrial without indicating the rights of the property clerk.

It must be borne in mind that sovereignty, in the

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exercise of the inherent police power, may impose reasonable limitations upon the individual for the general welfare of society. The attitude of the state, particularly in relation to crime, is dictated by a regard for the rights and welfare of the people generally. A person may be compelled to join in the prosecution of a crime that ostensibly affects him alone. He may even be detained as a necessary witness in a criminal proceeding. If the state may thus deprive a person of his liberty, it certainly may deprive him temporarily of the possession of his property. Such temporary withholding of possession is contemplated by the statutory provisions defining the duties and rights of the defendant.

The property clerk is made the custodian of all property taken from the person of a prisoner, and of all property alleged or even supposed to have been feloniously obtained, provided the same comes into the possession of the police department or any criminal court or magistrate in the city; and if any property is desired as evidence in any police or other criminal court provision is made for the delivery of the same to any officer who presents a proper order. These sections were passed upon in the case of *Simpson* v. *St. John*, 93 N. Y. 363. The sheriff, by virtue of a requisition in a replevin action, demanded certain chattels from the property clerk, who refused to give them up, and an order for his arrest was asked. The Court of Appeals says: "The order of arrest was refused on the ground that the chattels sought to be recovered were in the custody of a criminal court, pending the prosecution of the party alleged to have stolen them. Such a temporary retention of property for the purposes of criminal justice is within the police power. It in no manner denies or affects the title of the true owner, but postpones his right of possession until the

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exigencies of the prosecution are satisfied. Very often the production and identification of the stolen articles are essential to the conviction of the thief, and if by a claim of title they could be taken from the possession of the criminal court before trial of the offender, it would always be possible for him to put out of the way evidence necessary to his conviction. The property clerk in the city of New York is merely the agent of the criminal court pending the prosecution, and holds the property for the time being subject to its orders. It is, therefore, in the custody of the law, and cannot be taken away until that custody is ended by a conviction or acquittal, or by an order of the magistrate permitting its surrender to the owner." In short, property in the possession of the defendant, pending criminal prosecution in which such property may be needed as evidence, is in the "custody of the law."

In considering the above quotation, one may argue that the property there was chattels, whereas here it is money and that the retention of the latter for the purpose merely of evidence cannot be justified, as money has no distinctive traits or identifying characteristics and that oral testimony will serve all necessary purposes. The answer is that this may not be so under the particular circumstances involved.

When Van Gulick sold the jewlery, the purchasers either knew or did not know that he had stolen it. If they knew, they were guilty of the crime of criminally receiving stolen property (Penal Law, § 1308); if they did not know, Van Gulick must have misled them by a false pretense of ownership or agency to sell, in which case he was guilty of the additional crime of obtaining money under false pretenses, for the statute says that a person who, with intent to deprive or defraud the true owner of his property, obtains possession by color or aid of fraudulent representations

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or pretenses, steals such property and is guilty of larceny. Penal Law, § 1290. It is to be noted that the false representations need not be express, for the conduct of a person and the natural inferences to be drawn therefrom may speak louder than mere words. It is not necessary that the seller should say: "I am the owner of this property and will sell it to you," or "I am an agent duly authorized to sell this property," for where a person undertakes to sell property he impliedly represents that he either owns it or has authority to sell and the implied representation is an essential and integral part of the transaction. It is seen, therefore, that in the selling of the stolen jewelry, no matter which way we turn, a second felony was committed, either by the purchasers in criminally receiving stolen goods or by the seller in obtaining money from the purchasers under false pretenses. The inference is that criminal prosecution will follow.

The defendant has pleaded a separate defense alleging that certain criminal proceedings are pending and undetermined against certain persons and that defendant is required to hold the money in question to be used as evidence by the criminal authorities. Under this plea, the defendant may show that the certain persons proceeded against are the purchasers of the stolen property, the convicted thief, or even other persons for other crimes. And if defendant sustains his allegation the plaintiff, in my opinion, cannot recover at the present time, even though he is the holder of legal title to the money.

As has been seen, where a person steals or wrongfully deprives another of his property and then sells it, he gets legal title to the proceeds of the sale. *Warren* v. *Haight, supra; American Sugar Refining Co.* v. *Fancher,* 145 N. Y. 552. As between private individuals, where there has been a deprivation of property by

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fraud, the title continues vested in the wrongdoer until there has been a disaffirmance of the transaction by the person wronged. The rule, however, does not apply so as to interfere with the criminal prosecution by the people. Such prosecution is necessarily based upon the theory that the wrongdoer has unlawfully deprived the true owner of his property and, therefore, it is not necessary that there should be a rescission of the transaction by the latter in order to sustain a prosecution. It may be further said that, should Van Gulick eventually be convicted of the statutory larceny of obtaining money under false pretenses, he would necessarily be adjudged not to be the holder of title and, therefore, without any right to recover possession of the money in question. The conclusion reached may be summarized thus: if the $1,250 is the *corpus delicti* of the statutory larceny, plaintiff has no title to it; if only the proceeds of the sale of the *corpus delicti* of the original theft (jewelry), the plaintiff has title.

The facts in the case were mainly brought out on cross-examination of plaintiff's witness over objection and exception by plaintiff upon the ground that the questions called for matter not within the issues of the pleadings. The witness testified as to declarations made by the thief after the assignment of his right to the proceeds of the sale. There was no objection on the ground that the plaintiff was not bound by such declarations. If a proper objection had been made, there is no reason to believe that it would not have been sustained. If an objection is made on a specific ground, an exception can be urged on appeal on that specific ground and no other. *Fitch* v. *Kennard*, 2 Misc. Rep. 95, 97. There was, therefore, no error in overruling plaintiff's objection. However, as a new trial must be had for the error in dismissing the complaint, it will be well to bear in mind that declarations made

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by the assignor of personalty subsequent to the assignment are not admissible against the assignee. *Wangner* v. *Grimm*, 169 N. Y. 421, 431. Similar declarations made prior to the assignment are also inadmissible (*Merkle* v. *Beidleman*, 165 N. Y. 21) where the assignee is a purchaser for value.

Judgment reversed, new trial ordered, with costs to appellant to abide the event.

BIJUR, J. (concurring). Plaintiff sues as assignor of one Van Gulick, who it is admitted was in possession of $1,250 which the defendant received from him. It appeared that Van Gulick had stolen certain property, sold part of it and received $1,250 therefor, and that upon his arrest the $1,250 was taken from him by the police and deposited with the defendant as property clerk. Subsequently, Van Gulick was convicted of, and sentenced to a term of imprisonment for, the theft.

I cannot find in respondent's brief any basis for the judgment sought here to be sustained. The learned corporation counsel says, "it is a question of title." Cases are then cited for the proposition that if goods are stolen and sold in market overt, "the owner's property is not altered *in them* but he may take them wherever he finds them;" also that the *owner* of negotiable securities stolen may pursue the proceeds of the sale in the hands of the felonious taker or his assignee with notice. If this case turns "on the question of title" neither of the principles asserted by respondent seems to have any application. The money, to recover which this action is brought, was not stolen; consequently the rule that title to goods stolen is not lost by the owner is quite beside the point. Nor is this action brought by the owner of stolen goods to pursue the proceeds in the hands of either the felonious taker

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or his assignee; consequently the second rule set out is without any force here. Finally, although respondent cites sections 331 and 333 of the charter, I find nothing in those sections or in any other sections referring to the property clerk, which either expressly or by implication covers this case, nor does respondent explain how they do.

Respondent's counsel says: "The money in question here, as proceeds of sold stolen chattels, is stolen itself as a matter of law, as it stands in the place of the stolen chattel." This seems to me to be the vital point of the case and to be a totally incorrect statement of the legal situation. No authority is cited for the proposition, and a considerable search which I have made reveals none, except that in *Commonwealth* v. *Boudrie*, 70 Mass. 419, Bigelow, J., says of stolen property: "But if the property has been changed or converted into money the defendant may be well convicted of the larceny without any determination of the question as to his right to the property or money actually found in his possession." See, also, *Roberts* v. *Coleman*, 141 Mass. 231. Whatever, therefore, may be the right of the original owner of the stolen property, which rights are neither involved nor suggested in the present case, or whatever the possible relations between the purchaser of the stolen goods and the thief, concerning which this record is entirely barren, there seems to be no ground presented by the present record on which the right to possession of the money sued for on the part of the plaintiff can be successfully challenged.

The ingenious suggestion has been made that the testimony which was admitted in regard to the circumstances under which Van Gulick sold the jewelry may be interpreted as signifying that the purchaser was innocent of knowledge that the jewels had been stolen;

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that Van Gulick, therefore, must be assumed to have sold them with an implied warranty of title in himself; that this was a false representation to the vendee; and that, consequently, the money was obtained by what the Criminal Code defines as larceny, and was finally, therefore, feloniously obtained. I am far from clear that the circumstances of the sale permit of the inference of innocence on the part of the vendee, but I shall assume that such inference is permissible, and that it would, therefore, follow that this money had been obtained by Van Gulick, plaintiff's assignor, by way of false representations, or, as it is sometimes termed in the criminal law, false pretenses. That fact, however, would not change the determination of the rights of the respective parties to this litigation. A person who obtains money or property through false representations is, nevertheless, invested with the title thereto until divested by some affirmative act of the party defrauded in the exercise of his option to cancel the transaction *ab initio*. The distinction is clearly recognized in the cases between money obtained by theft, namely, larceny, as it is known at common law, and money obtained by false representations, even though that process be defined in statutory law as larceny or a felony. In the case of theft or common law larceny, no title is obtained by the thief. In the case of false representations, or what I might term merely statutory larceny, the title passes. *Benedict* v. *Williams*, 48 Hun, 123; *Barnard* v. *Campbell*, 58 N. Y. 73–76; *American Sugar Ref. Co.* v. *Fancher*, 145 id. 522, 560, 561. See, also, *Marden* v. *Dorthy*, 160 id. 39, 59.

Further reference is also made in this connection to the power of the property clerk to receive and to hold money "alleged to have been feloniously obtained." Adopting even a very liberal view of the sections of

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the charter which I have cited, which define the powers and duties of the property clerk, and assuming that he had properly obtained possession of these moneys under these provisions, it is nevertheless provided that the property clerk may dispose of the money or property which has come into his hands only (§ 335) if it "be not claimed by the owner." It seems to me quite clear upon the authorities that, until some action be taken, either by the person from whom the property was originally stolen or the person who we have assumed parted with the money on false representations, Van Gulick must, in the eye of the law, be deemed to be the "owner," and that this action by his assignee is properly brought.

I express no opinion on the result of proof, if any be adduced, to the effect that the money involved is retained by the defendant as evidence in a criminal prosecution.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

JOSEPH ASCH, Respondent, *v.* JACOB B. PRICE, LOUIS TULCIN, HARRY TULCIN and PRICE BROS., Appellants.

(Supreme Court, Appellate Term, First Department, December, 1917.)

Pleading — answer — negotiable instruments — accommodation indorsers — Municipal Court Code, § 92.

The answer in an action brought against the accommodation indorsers of a promissory note may be amended so as to allege a denial of the signatures to the instrument and a demand that they be proved as required by section 92 of the Municipal Court Code.

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APPEAL by defendants from a judgment of the Municipal Court of the city of New York, borough of Manhattan, second district, in favor of plaintiff, after a trial by a judge without a jury.

Harry Dimin, for appellants.

Lester M. Friedman, for respondent.

BIJUR, J. This action was brought to recover on promissory notes, defendants being sued as accommodation indorsers.

Although the answer contained a specific denial of each paragraph of the complaint, it did not contain a demand that the genuineness of the signatures be proved as required by section 92 of the Municipal Court Code. Nor was "a specific denial of the genuineness of the signature and a demand that it be proved" filed with the clerk within eight days after joinder of issue. The learned judge below was of opinion that the section cited was "mandatory" to the extent that no amendment could be allowed to cure the defect. Since, however, the section provides that the signature shall be taken as admitted unless a denial and demand be filed by the clerk within eight days after joinder of issue, and continues "such denial and demand by a defendant may be included in his answer," there would seem to be no reason why an amendment of the answer may not be permitted in a case of this kind to correct an oversight or mistake precisely as in any other case, with due provision against surprise or other disadvantage resulting to the plaintiff.

Defendants' motion for amendment of the answer having been refused, not as matter of discretion, but because the learned judge felt himself without power

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to permit it, the judgment must be reversed and a new trial granted, with thirty dollars costs to appellants to abide the event.

PHILBIN and ORDWAY, JJ., concur.

Judgment reversed and new trial granted, with costs to appellants to abide event.

JERRY BARONE, an Infant, by FRANK BARONE, His Guardian ad Litem, Respondent, *v.* BRAMBACH PIANO COMPANY, a Domestic Corporation, Organized and Existing under the Laws of the State of New York, Appellant.

(Supreme Court, Appellate Term, First Department, December, 1917.)

Workmen's Compensation Law, §§ 11, 50 — action for personal injuries — evidence — negligence — statutes.

Under section 11 of the Workmen's Compensation Law the remedy therein afforded to an employee against his employer for personal injuries received in the course of his employment is exclusive, and in an action by an employee who, while at work in a cellar in defendant's factory, was bitten by a dog kept there by the engineer for a year or more, presumably with the permission of the defendant, the burden is on plaintiff to show that the statute did not apply by reason of defendant's failure to secure the payment of compensation as required by the statute; and where no proof is offered to sustain the allegation of the complaint of such failure on the part of defendant a judgment in plaintiff's favor will be reversed and a new trial ordered, as the language of section 50 of said statute, which is mandatory on every employer in this respect, gives rise to the presumption that the defendant had complied with such duty.

The plaintiff was engaged in the performance of the duties of his employment at the time he was injured, and the presence of the dog with defendant's implied knowledge and consent was one of the physical conditions of the plant under which defendant required plaintiff to perform his duties.

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APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, ninth district, in favor of plaintiff, after a trial by a judge and a jury.

Bertrand L. Pettigrew (J. C. Miller, Jr., of counsel), for appellant.

E. S. Garnett, for respondent.

BIJUR, J. Plaintiff, an employee of defendant engaged in the manufacture of pianos, was injured by the bite of a dog under the following circumstances:

He had been directed by his superior to carry some materials into a cellar of the factory. The engineer stationed in the cellar had kept a dog there for a year or more. It must be presumed from the lapse of time that the dog remained there with the permission of the defendant.

Appellant urges that plaintiff cannot maintain this action because his remedy under the Workmen's Compensation Law is exclusive. Plaintiff had alleged in the complaint that defendant had failed to "secure the payment of compensation to plaintiff for said injuries," but he offered no proof in support of this allegation. Defendant contends that in view of the provisions of the law (§ 11) that the remedy therein afforded shall be exclusive the burden was upon plaintiff to prove that the law did not apply by reason of defendant's failure to "secure the payment of compensation" as therein required. I think that the language of the statute (§ 50), which is mandatory upon every employer in this respect, gives rise to the presumption that the defendant has complied with this duty placed upon him, and that the burden is upon the plaintiff to establish the fact which prevents the application of the law to himself. This very point is

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impliedly held in *Shinnick* v. *Clover Farms Co.*, 169 App. Div. 236, 237, and although it has been intimated in *Connors* v. *Semet-Solvay Co.*, 94 Misc. Rep. 405–410, that the *Shinnick* case has been in substance overruled by *Matter of Jensen* v. *Southern Pac. Co.*, 215 N. Y. 514, the suggestion does not relate to the point now under consideration. I think, therefore, that the judgment must be reversed.

Plaintiff also urges that the law does not apply because the injury complained of was not sustained by the employee "arising out of and in the course of his employment," as provided by section 10. This subject has been discussed in an elaborate opinion of Mr. Justice Lyon in *Matter of Moore* v. *Lehigh Valley R. R. Co.*, 169 App. Div. 177. See, also, *Matter of Rheinwald* v. *Builders' Brick & Supply Co.*, 168 App. Div. 425. The instant case, however, seems to me to be much simpler of solution. There is no doubt that the plaintiff was engaged in performing the duties of his employment at the time he was bitten. The presence of the dog with defendant's implied knowledge and consent was one of the physical conditions of the plant under which the defendant required the plaintiff to perform his duties. The mere fact that the direct cause of the injury was animate rather than inanimate does not alter the result; nor in this view can I see any force in the suggestion that the dog was not especially kept as a watch-dog or for some similar purpose (though I think the proof showed that it was so employed). The right of the plaintiff to a recovery does not, on any theory of which I am made aware, depend upon the comparative usefulness to the employer's business of the immediate cause of the injury.

PHILBIN and ORDWAY, JJ., concur.

Judgment reversed and new trial granted, with costs to appellant to abide event.

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W. EDSON ANDREWS, Respondent, v. COSMOPOLITAN BANK, Appellant.

(Supreme Court, Appellate Term, First Department, December, 1917.)

Banks — impairment of capital — duties of directors of — superintendent of banks — evidence — actions — Statute of Limitations.
Statute of Limitations — waiver of — banks.

Where in consequence of a letter from the superintendent of banks, calling attention to the fact that the capital of the defendant bank was impaired and requiring the same to be made good, the board of directors held a meeting, at which the letter was read, and unanimously adopted a resolution that the directors put in enough to make a surplus account exceeding the amount of such impairment, a contribution by plaintiff, one of the directors, to said account constitutes a gift and not a loan, and he is not entitled to recover the same by an action against the bank.

The fact that plaintiff subsequently received a receipt signed by the cashier of the bank, who was not shown to have any authority to sign anything more than a mere acknowledgment of the receipt of the money, stating that plaintiff's payment was a loan, is not sufficient to change the character of the transaction, nor could any understanding of the other directors as to their own payments, if competent for any purpose, justify the conclusion that plaintiff's payment was a loan.

Where the court, over defendant's objection and exception, admitted in evidence a letter from one of the other directors written after the adoption of said resolution to show that the writer understood the transaction to be a loan, but refused to admit a letter also written after said resolution by the president of the bank in his official capacity to the superintendent of banks, stating that the directors would "donate to the bank the amount (of their payments for surplus) as they originally intended," to which exclusion defendant excepted, the contrary and inconsistent rulings cannot be regarded as harmless.

The formal waiver of the Statute of Limitations by the directors of the bank more than six years after the adoption of the resolution in question, though probably sufficient to meet that

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defense if there was shown to have been an original obligation to repay the money, could not create an obligation where none had ever existed. If it can be treated as an admission of the existence of such an obligation it was not conclusive and being inconsistent with the conceded facts did not justify a finding that the original transaction was a loan.

BIJUR, J., dissents.

APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of The Bronx, second district, in favor of plaintiff, after a trial by a judge without a jury.

Choloney & Weinberger (Nathaniel Choloney, of counsel), for appellant.

Raymond B. Stringham, for respondent.

ORDWAY, J. Plaintiff sues to recover the sum of $125 claimed to have been loaned by him to the defendant. The defendant pleads a general denial and the Statute of Limitations. Plaintiff at the time of the transaction, August, 1906, was one of the directors of the defendant bank. At that time the capital of the bank was impaired to the extent of about $1,600, and the superintendent of banks, on August 13, 1906, wrote to the bank a letter calling attention to that fact and requiring the stockholders or directors of the bank to make good the impairment. In consequence of this letter a meeting of the board of directors of the bank was held on August 16, 1906, at which the letter from the superintendent of banks was read; thereupon "Mr. Knox suggested that there be a surplus account opened on the books of the bank, and after due consideration Mr. Williamson moved and Mr. Knox seconded the motion that the directors put in enough to make a surplus account of $2,000, which was unanimously adopted."

Apparently the plaintiff was not present at the meet-

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ing, since the minutes of the meeting do not show that he was. Thereafter, apparently on August 17, 1906, plaintiff paid to the bank $125 and received a receipt therefor "on account of fund loaned to bank by directors to create a surplus fund to be repaid as soon as bank's earnings will permit," signed by the cashier of the bank, who was not shown to have any authority to sign a receipt in that form. It was also proved that other directors sent similar contributions accompanied by letters addressed to the bank, in one of which it was stated, for example, that the $125 was to be used as a "private fund of loan to bank by directors * * * to be repaid to me from the bank's earnings as soon as practicable." One of the other directors testified that he understood that his own payment was a loan. On August 17, 1906, defendant's president wrote to the superintendent of banks that the directors had "voted unanimously to have a surplus fund of $2,000 and that the same be contributed *pro rata* by all the directors of the Bank. It is a pleasure to inform you that the action of the Board was spontaneous, and each member present paid in his contribution so as to make $2,000 which will be in by Monday, August the 20th instant." It was conceded that the defendant has had a surplus and has been in a position to repay the money since about 1910, and on September 19, 1912, the board of directors adopted a resolution "that the Statute of Limitations shall not apply to the $2,000 principal advanced by the directors of the Bank under resolution passed at meeting held August 16, 1906, in accordance with instructions from Banking Department of the State."

The facts as stated above were not disputed. The court below was of the opinion that they showed that the transaction was a loan and entered judgment for the plaintiff, from which defendant appeals.

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In my opinion the plaintiff's payment to the defendant must be regarded as a contribution or gift, and not as a loan. When we take into consideration the letter of the superintendent of banks and the resolution of the board of directors of August, 1906, of both of which plaintiff must be presumed to have had knowledge, since he was a director of the bank, and is conceded to have sent in his check for his share of the amount to be "put in" and the letter of the president of the bank of August 17, 1906, it seems to me clear that it was the directors' duty to take steps to make the impairment good; that payments by the directors could not "make a surplus account of $2,000," unless the payments were outright donations and not loans, and that plaintiff's payment must therefore be regarded as a gift and as so intended, at least in the absence of any evidence of his own to show that he did not so intend it. See *Leask* v. *Hoagland,* 205 N. Y. 171; *Levy* v. *Friedman,* 83 Misc. Rep. 445. The fact that plaintiff subsequently received a receipt signed by the cashier of the bank, who was not shown to have any authority to sign anything more than a mere acknowledgment of the receipt of the money, stating that this payment was a loan, is not sufficient in my opinion to change the character of the transaction as shown by the record. Nor do I think that the understanding of the other directors as to their own payments, if competent for any purpose, can justify the conclusion that plaintiff's payment also was a loan.

If the transaction is to be treated as a loan, it not only nullifies the directors' formal resolution of August 16, 1906, but also implies bad faith on the part of the directors towards the superintendent of banks.

In addition to this, the learned trial justice erred in rulings on evidence which in themselves would require a new trial. He admitted, over defendant's objection and exception, a letter from one of the other directors,

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written after the resolution of August 16, 1906, to show that that director understood the transaction to be a loan, but he refused to admit a letter, also written after that resolution, by the president of the bank, who was also a director, in his official capacity, to the superintendent of banks, stating that the directors would "donate to the bank the amount (of their payments for surplus) *as they originally intended,*" to the exclusion of which the defendant excepted. If the former of these letters was admissible the latter certainly was, and as they related to the crucial question in the case these contrary and inconsistent rulings cannot be regarded as harmless error.

The formal waiver of the Statute of Limitations by the directors of the bank in September, 1912, although probably sufficient to meet that defense if there was shown to have been an original obligation to repay the money, could not create an obligation where none had ever existed. If it can be treated as an admission of the existence of such an obligation, it is not conclusive, and being inconsistent with the conceded facts does not justify a finding that the original transaction was a loan.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide the event.

PHILBIN, J. (concurring). I concur with Mr. Justice Ordway. The directors certainly were under a duty to see that the impairment of capital was made good. Banking Law, § 17, August, 1906.* Having chosen not to impose assessment on the shareholders as required by law, the directors were bound to contribute as the shareholders would have done — without creating a new liability on the part of the bank, either actual or contingent. It may also be noted that plain-

* See Laws of 1892, chap. 689, § 17, as amd. by Laws of 1906, chap. 649.— [REPR.

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tiff, by virtue of his office, was required to be a shareholder (Id. § 50) and was under an obligation to make contribution as a gift and not as a loan.

It is impossible to suggest any motive for the contribution by the plaintiff other than the exigency that arose by reason of the impairment of capital and the superintendent's requisition. To assume that plaintiff was unacquainted with the steps taken to apply the necessary remedy, is to assume that plaintiff, charged with the administration of the affairs of the bank (Id. § 43) and at a time when the very existence of the bank was threatened, was not performing his duty as director. Moreover, the very receipt on which plaintiff bases his claim shows that he had knowledge. Such receipt states that the contribution was made "on account of fund loaned to bank by directors, to create a surplus fund, to be repaid as soon as bank's earnings will permit." The plaintiff, therefore, knew that a surplus fund was to be created by the directors; he also plainly knew that he was not making an ordinary loan.

BIJUR, J. (dissenting). I dissent. I regret to have to differ with my colleagues in almost every respect in the view which they take of this appeal.

It is conceded that the plaintiff was not present at the meeting of the bank directors on August 16, 1906. I know of no principle whereby a director of any corporation as an individual is chargeable either impliedly or constructively with knowledge or notice of proceedings at which he was not present. I think, therefore, that in construing the relation between these parties in respect of the issue here presented neither the letter of the superintendent of banks nor the minutes of the directors which it called forth have any material bearing. Nor does the principle recognized in *Leask* v. *Hoagland*, 205 N. Y. 171, have any application in the

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sense indicated in the majority opinion herein. It is, in substance (citing from *Nay* v. *Curley*, 113 N. Y. 575), that "*in the absence of explanation,* the presumption arising from the delivery of a check is that it was delivered in payment of a debt, and not as a loan. * * * But a check may represent a loan or a gift, or money of the drawer, to be applied by the drawee to the use of the former as his agent or otherwise." Later on the court approves of Stephen's definition of a presumption as "a rule of law that courts shall draw a particular inference from particular facts *unless and until the truth of the inference is disproved.*" So far as the evidence in the instant case is concerned, plaintiff disproved any inference that might otherwise be drawn by showing the terms and conditions upon which his check for $125 to the order of the bank was delivered. This explanation is contained in the receipt of the cashier which specifies that the money was received "on account of fund loaned to bank by directors to create a surplus fund, to be repaid as soon as the bank's earnings will permit." There is, therefore, no room left for presumptions or inferences other than the fact so proved.

I have at least grave doubt whether the cashier is not, by virtue of his office, warranted in fixing the terms of a loan to a bank, but that question is also, in my opinion, not involved here. Plaintiff paid to, or deposited with, the bank a sum of money on the conditions expressed by the cashier. If the cashier was without authority to establish these conditions as binding upon the bank, then the money does not become forfeited to the bank, but, on the contrary, belongs unconditionally to the plaintiff. But plaintiff's proof went far beyond that point. He showed that other directors sent similar contributions, and that one of these directors inclosed his check in a letter reading:

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"Enclosed please find my check * * * same to be used as private fund of loan to bank by directors * * * to be repaid to me from the bank's earnings as soon as practicable."

This director was present at the meeting of the directors on August 16, 1906. The bank accepted and cashed the check inclosed in the letter above recited. This letter, therefore, in my opinion, was competent and material evidence as both an admission on the part of the bank of the character of the transaction authorized at the meeting, and as an implied ratification of the act of the cashier in receipting for the moneys on that basis. Moreover, another of the directors was permitted to testify, without objection, that he contributed some of this money, and that "according to his understanding," it was to be a loan. In view of the informality of the trial, it might perhaps be said that this testimony is not entitled to its full apparent significance. But, on the other hand, the act of defendant's attorney in permitting it to be offered without objection illustrates the actual position taken by the defendant at the trial, namely, that even though the directors individually understood their contributions to be a loan, and the bank so accepted them, the illegality of the transaction, or possibly the attitude of the superintendent of banks in regard thereto, prevented the intention of the directors from becoming effective and imposed the will of the superintendent of banks upon them to the extent of creating a contract other than that which the parties may have intended. In other words, I do not think it was the contention of defendant's counsel at the trial that the transaction was originally intended as between the bank and the directors to be other than a loan on the terms stated in the cashier's receipt. But whatever his position may have been, I am of opinion that plaintiff has presented overwhelming evidence to

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the effect that it was such a loan. It seems to be equally clear that the letter of the superintendent of banks, written to the president of the defendant on December fourth, nearly four months after the transaction, and the reply of the president of the defendant to the superintendent, dated December twenty-first, are wholly incompetent as against this plaintiff. Their only materiality to the issues involved (if they are to be regarded as in evidence at all) is that they show beyond a doubt that the president was aware that the cashier had given the receipts in the form in which plaintiff's receipt reads, and that the records of the bank disclosed that fact clearly to the superintendent. The existence of this condition for four months after the transaction, without objection on the part of the bank, constituted a further ratification of the authority of the cashier and a further confirmation of the original understanding of the parties in the premises. And finally, as an additional ratification and confirmation, we have the resolution adopted by the directors of the defendant years afterward, in which it was resolved that the Statute of Limitations should not apply to the $2,000 "*advanced* by the directors of the bank."

As I read the record, therefore, it seems to me that the evidence is conclusive to the effect that the transaction was as claimed by the plaintiff and as expressed in the receipt of the cashier, and this would be true even if the intention of the other directors in adopting the original resolution had been different. I do not think that the validity of the transaction under the Banking Laws of the state or the wishes or directions of the superintendent of banks had any materiality to the controversy. Whatever pains or penalties might be visited upon the plaintiff by virtue of any statute for a failure to perform, or an affirmative violation of, any statutory duty, this consideration could not impose

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upon him a contract other than the one which had actually been made between himself and the defendant by mutual consent.

But since defendant's counsel has throughout insisted upon the illegality of the entire transaction, and the majority opinion refers to the "directors' duty to take steps to make the impairment (of the capital) good," that subject should perhaps not be left without some comment. I am not cited to any part of the Banking Law which imposes upon the directors the duty to take steps to make good an impairment of capital except to the extent that section 17 permits the superintendent of banks to require the capital to be made good, in which event the directors must give notice to the *stockholders* of the appropriate and adequate assessment. This provision suggests that in the instant case the directors undertook to make good for the time being the impairment of the capital and to "put in" *on behalf of the other stockholders* their *pro rata* of this deficiency. While this transaction may not have been in strict compliance with the letter of the law or within the exact requirement of the superintendent of banks, *had he imposed an assessment* — which he did not — nevertheless it is clear that, under the plan as plaintiff has proved it to have been, an amount equivalent to the impairment was actually furnished to the bank irrevocably so far as the interests of the creditors might be concerned. It was only to be repaid to the contributing directors "when the bank's earnings will permit," which must be interpreted as meaning when a surplus should exist. In the event of that contingency, however, the directors would have been at liberty to declare a dividend in the same amount. The substance of the transaction, therefore, as distinguished from its form, was an actual contribution by the directors on behalf of all the stockholders of the

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amount of the impairment with an assignment to these directors *pro rata* by each stockholder of his *pro rata* share of the first dividend which might be declared up to the amount of this total contribution.

We are not called upon to approve or disapprove the validity of a possible transaction in that form or to that effect; but it seems to me to be quite clear that in and of itself it would be meritorious on the part of the directors, advantageous to the creditors, and not unfair to the stockholders of the bank.

The judgment should be affirmed, with twenty-five dollars costs to the respondent.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

LOUIS GLUCKSMAN, Respondent, *v.* THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, Appellant.

(Supreme Court, Appellate Term, First Department, December, 1917.)

Greater New York Charter, § 1543 — power of board of education to make ratable deductions from salaries of teachers in city schools — schools — actions.

Under section 1543 of the Greater New York Charter the board of education of the city of New York has power to make ratable deductions from the salaries of teachers in the city schools on account of absence from duty without leave, and section 65(3) of the by-laws of said board provides that "one twenty-fifth of a month's salary shall be deducted for every day of absence on the part of a * * * teacher unless such * * * teacher is excused for adequate cause, in accordance with these by-laws; but the aggregate deductions in any one month shall not exceed the salary for that month." *Held*, that where plaintiff's assignor, a teacher in one of said schools at a salary of $1,200 per annum, was absent without leave for eleven actual days included in the period from October 15 to

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October 29, 1915, inclusive, a deduction of $44 from her salary for said month was a "ratable deduction" and no action will lie to recover the amount so deducted.

The said board of education acted within its powers when it provided that if a teacher absent herself from service on the days when she is or may be required to work she should not be compensated for the days on which she is expected to rest from that work.

APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, second district, in favor of plaintiff after a trial by the court without a jury.

Lamar Hardy (Terence Farley, Charles McIntyre, of counsel), for appellant.

Arthur C. Mandel, for respondent.

ORDWAY, J. Apparently this is a test case, indirectly involving a very large amount of money. Plaintiff's assignor, a teacher in the public schools of New York city, was absent without leave for the eleven actual school days included in the period from October 15 to October 29, 1915, inclusive. As that year was her eleventh year of service, she was entitled under the charter and the defendant's schedule to be paid at the rate of $1,200 per annum. Section 1543 of the charter provides that "* * * Every head of department [which concededly includes the board of education] is empowered to make ratable deductions from the salaries and wages of the employees and subordinates of his department or office on account of absences from duty without leave." Section 65, subdivision 3, of defendant's by-laws provides that "one twenty-fifth of a month's salary shall be deducted for every day of absence on the part of a * * * teacher, unless such * * * teacher is excused for adequate cause, in accordance with these by-laws; but the aggregate deductions

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in any one month shall not exceed the salary for that month." The defendant deducted forty-four dollars from the salary of the plaintiff's assignor for the month of October, 1915, and plaintiff, as her assignee, seeks to recover that amount on the ground that the deduction was not "ratable." The case was submitted on an agreed statement of facts and the learned trial justice held that only one-three hundred and sixty-fifth of the yearly salary could be deducted for each actual school day of absence without leave, and awarded judgment in favor of the plaintiff for the difference between the forty-four dollars deducted and eleven-three hundred and sixty-fifths of one thousand two hundred dollars, or thirty-six dollars and sixteen cents, amounting to seven dollars and eighty-four cents, from which judgment defendant appeals.

The question is what is a "ratable deduction." Ratable means proportional, in due proportion, and the deductions should be in due, *i. e.*, the same, proportion to the salary that the time of absence from duty without leave bears to the entire time of duty. It is not correct, therefore, to calculate, as the learned trial justice has done, the time of absence from duty in this case as the number of actual school days which the teacher was absent, viz., October fifteenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, or eleven days, and the entire time of duty for that period as every day from the fifteenth to the twenty-ninth of October inclusive, or fifteen days. The time of absence from duty must be calculated on the same basis as the entire time of duty. Otherwise, we should have this result: If a teacher was absent without leave for the entire school year, only about one hundred and ninety-five-three hundred and sixty-fifths of her annual salary could be deducted, as there are

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only about 195 actual school days in any calendar year, and, on the theory of this judgment, she would receive about $560 for no work at all, and there would only be deducted from her salary about $640, which is not a ratable deduction.

The by-law complained of recognizes this situation, and while perhaps not mathematically accurate does make a substantially proportionate deduction for absence without leave, that is, a deduction bearing a reasonable relation to the proportionate absence from duty with reference to the entire period of duty. The by-law is evidently based on the theory that there are about 300 days during the year during which teachers may be, although in fact not ordinarily, called upon to work. This figure of 300 possible working days in the year is arrived at by deducting Sundays and legal holidays from the 365 days in the year, and conforms to the custom of the state and city departments in multiplying the salary or wages of *per diem* employees by 300 in order to ascertain their comparative salary grade with reference to employees paid an annual salary, for the purpose of administering the civil service laws. In my opinion, this is a reasonable basis on which to make ratable deductions for absence without leave, and if not precisely accurate in a mathematical sense is substantially so. In each month there is a fraction over thirty days, a fraction over four Sundays and an average of about one legal holiday; deducting the Sundays and legal holidays leave about twenty-five days in each month as possible working days. If a teacher is absent without leave one or more of those working days on which she is called on to work, a deduction of one-twenty-fifth of her monthly salary for each day of absence is fair and reasonable and must be held to be a ratable deduction. Plaintiff loses sight of the fact that the salary is paid for six days' active service

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and for one day's rest (on the Sabbath) *from the labors of the previous week.* If a teacher chooses to absent himself without leave from the labors of the six working days, he is not entitled to compensation for the day when he is supposed to be recuperating from those labors and thus to prepare himself for the active service of the ensuing week. It might perhaps be equally correct to say that for each of the six working days he is entitled to one-sixth of the week's proportion of his salary.

At all events, the board of education seems to me to have acted well within its powers when it provided that if a teacher absent himself from service on the days when he is or may be required to work he should not be compensated for the days on which he is expected to rest from that work.

Judgment reversed, without costs of appeal to either party, and complaint dismissed upon the merits, with costs.

BIJUR and PHILBIN, JJ., concur.

Judgment reversed, without costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. NEW YORK EDISON COMPANY, Relator, *v.* WILLIAM A. PRENDERGAST, as Comptroller of the City of New York, Defendant.

(Supreme Court, New York Special Term, December, 1917.)

Mandamus — peremptory writ of — when tax by assessors void — actions — certiorari — Greater New York Charter, § 246.

Where an assessment though valid on its face is in fact void because the assessors had no jurisdiction to make it, an action is maintainable to recover money involuntarily paid in satisfac-

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tion thereof without first having the assessment set aside or vacated, and a demand for the money is unnecessary before action brought.

Relator, the owner of certain premises in the city of New York, leased the same to a tenant which upon entering into possession installed certain machinery which was never owned or leased by relator. *Held,* that an assessment of the machinery as a part of relator's property, after correction and notification to the city's officers that said machinery was not owned by relator but by its tenant who also paid taxes thereon, was void *ab initio.*

Where, notwithstanding such notification, the city continued for years to assess the value of the machinery as against relator, it was not compelled to bring certiorari to review the assessment but had the right to sue for and recover the amount of taxes illegally paid and the Statute of Limitations was no bar in equity to the claim, and at least so much thereof as had accrued within the last six years should be certified by the comptroller.

A contention that the assessment was merely an overvaluation and not illegal would be of force on an application under section 246 of the Greater New York Charter for a peremptory writ of mandamus to compel the city comptroller to certify relator's claim to the board of estimate and apportionment as an invalid or illegal claim, but one which the city in equity and good conscience should pay, but for the fact that said section of the charter was passed for the very purpose of relieving those having just claims against the city of the law's many technicalities in tax proceedings.

APPLICATION for a peremptory writ of mandamus.

James M. Vincent, for plaintiff.

Lamar Hardy, corporation counsel, for defendant.

GAVEGAN, J. This application is made under section 246 of the Greater New York Charter* for a peremptory writ of mandamus to compel the comptroller of the city of New York to certify relator's claim to the board of estimate and apportionment as an invalid or illegal claim, but one which the city of New York in equity

* See Laws of 1907, chap. 601.— [REPR.

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and good conscience should pay. Relator for twelve years has been the owner of the property at the southeast corner of Eightieth street and East End avenue. Prior to 1905 it leased the entire building to the Electric Testing Laboratories, which entered into possession on January 1, 1905, and installed a quantity of machinery. This machinery was never owned or leased by relator. In 1905 the city of New York assessed relator's property for taxation in the sum of $250,000, divided, as shown by the field books of the deputy tax commissioner, as follows: Land, $38,000; machinery, $57,000, and building, $55,000; totaling $150,000. The assessment was therefore erroneous by $100,000. Relator thereafter had the error corrected, and at the same time notified the city's officers that the machinery in the building was not owned by it, but by its tenant. Notwithstanding this notification the city continued from 1905 to 1915 to assess the value of said machinery as against the relator. In the last mentioned year relator had the assessment for the machinery, amounting to $60,000, deducted, and since then has been paying taxes only upon an assessed valuation of $90,000; so that from 1905 to 1914 inclusive the relator paid taxes on the machinery of its tenant, who also paid taxes on same. The city has therefore been collecting double taxes on the same machinery. Relator claims that the city, against which it has no legal or valid claim, should refund the amount of the tax paid on the machinery. Respondent comptroller, in his discretion, refuses to certify the claim for the reasons (1) that it is barred by the Statute of Limitations; (2) that all presumptions are against an interpretation of section 246 of the charter which would authorize the comptroller and the board of estimate and apportionment to review assessments of real or personal property, and (3) that the facts presented do not make out a *prima facie* case of

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equity in the relator's claim. The relator contends that the original levying of the tax on the machinery not owned by it was illegal and void *ab initio* and that therefore the Statute of Limitations could not bar the claim in equity. This being so, it is not compelled to bring certiorari proceedings, but had the right to sue and recover the amount illegally paid. I am of the opinion that the relator's contention in this respect is correct. The city had no right to assess as against relator property which never belonged to it, and while relator in one sense voluntarily paid a tax thereon such payments were clearly made upon a mistake of fact, and for the purpose of this motion the payments should be held to have been made involuntarily. *Bruecher* v. *Village of Port Chester,* 101 N. Y. 240. In *Ætna Ins. Co.* v. *Mayor,* 153 N. Y. 331, the court, at page 339, said: "The tax being void, the amount paid the city may be recovered in an action for money had and received. It seems to be settled in this state that, where an assessment is valid on its face, and in fact void because the assessors had no jurisdiction to make it, an action may be maintained to recover back money involuntarily paid in satisfaction thereof without first having the assessment set aside or vacated, and a demand for the return of the money is unnecessary before the commencement of an action to recover it." At least so much of the relator's claim as had accrued within the last six years should therefore be certified by the comptroller. As to the balance of relator's claim the court can do no more than to defer to the respondent's discretion. *People ex rel. Dady* v. *Prendergast,* 203 N. Y. 1. Respondent's contention that the assessment was merely an overvaluation and not illegal is not convincing. The case of *People ex rel. Soeurbee* v. *Purdy,* 179 App. Div. 748, relied on by respondent, would have some

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force in this application were it not for the fact that section 246 of the charter was passed for the very purpose of relieving those having just claims against the city of the law's many technicalities in tax proceedings, as pointed out by Mr. Justice Page in his opinion. In that case the building assessed, although only partly erected, belonged to the owner, while here the property never belonged to the relator. Furthermore, when the city did determine to reduce the assessment of relator's property it deducted $60,000 therefrom, which was the exact value placed on the machinery. Therefore it seems fair to assume that all previous assessments were not overvaluations, but assessments against the machinery, and it seems also fair to assume that the city recognized the injustice of levying the tax on the machinery. I am of the opinion that relator's claim is one contemplated by section 246 of the charter and that it should be certified to the extent I have indicated.

Ordered accordingly.

BERNARD J. YORK and Another, Plaintiffs, *v.* McKEEVER COMPANY, Defendant.

(Supreme Court, New York Special Term, December, 1917.)

Attorneys — action for legal services — trial — evidence — when motion for compulsory reference granted.

Where, in an action by attorneys to recover for legal services some of which were rendered not for the defendant corporation but for individuals connected therewith, there was presented a large number of subjects of employment that had no relation to each other nor apparent connection except the fact that they were rendered by plaintiffs for defendant, and it is probable that it would be impossible for the jury to keep in mind the evidence in regard to each of the many items of the claim and to give that evidence its proper weight and application, a motion for a compulsory reference of the issues will be granted.

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MOTION by the plaintiffs for an order referring this action to a referee to hear and determine.

York & York, plaintiffs in person (Bernard J. York, of counsel), for motion.

Louis D. Schwartz, opposed.

GIEGERICH, J. The plaintiffs by this motion seek a compulsory reference of the issues of fact in this action. The action is brought to recover a balance of $2,918.06 for legal services alleged to have been performed and disbursements made by the plaintiffs for the defendant at its special instance and request, which services are alleged to be reasonably worth the sum of $3,918.06, the complaint stating that $1,000 was paid on account thereof. It appears from the papers submitted that in addition to numerous items of disbursements there are more than fifty different items in the plaintiffs' claim for legal services, all of which items are for separate services, none having any relation to any of the others. The amended answer puts in issue the value of all the services rendered and the disbursements made and, furthermore, denies that thirteen of the items of services, including the most important, and also some of the most important items of disbursements, were rendered or made at the instance or for the account of the defendant. The amended answer also denies the allegations of the complaint concerning the payment by the defendant of $1,000 on account of the alleged services and concerning the balance claimed to be due and sets up the Statute of Limitations as to a number of the items. So far as concerns the items of services which are admitted to have been performed, but the value of which is disputed, some of those items are for services of small value and of a formal character, such as making reports to the federal and state governments and

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drawing deeds and chattel mortgages; but, on the other hand, upwards of half of them are apparently of such a character that considerable testimony will have to be taken and a number of facts considered in arriving at a correct valuation of such items, which include several litigated matters, besides adjustments of what appear to be claims and disputes. Furthermore, there are upwards of twenty items of disbursements made in connection with the services so admitted to have been rendered. The decisions are not entirely clear as to when a compulsory reference should be granted in an action by an attorney to recover for legal services rendered. There is, however, a well-recognized test laid down and that is that where so many separate and distinct matters have to be litigated that a jury could not keep the evidence in mind in regard to each of the items and give it its proper weight and application when they retired to deliberate upon their verdict then a reference should be ordered. *Spence* v. *Simis,* 137 N. Y. 616; *Russell* v. *McDonald,* 125 App. Div. 844; *Richards* v. *Stokes,* 1 id. 305; *Clinch* v. *Henck,* 49 id. 183; *Hedges* v. *Methodist Protestant Church,* 23 id. 347. As above shown, the present case presents a large number of subjects of employment that had no relation to each other nor any apparent connection except the fact that they were rendered by the same attorneys for the same client. In *Clinch* v. *Henck, supra,* it appears from the opinion of the court that there were at least twenty different subjects of employment embraced in the services claimed to have been rendered by the plaintiff. As there was a general denial, the court observed that each one of the items in the plaintiff's bill of particulars would have to be examined and proven under the issue framed as if it were a separate cause of action. That, I think, is equally true of the present case. In *Richards* v. *Stokes, supra,* Presiding Justice Van Brunt called

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attention to the fact that it would be impossible for the jury to separate the services which were rendered for the estate and those which were rendered for the defendant individually in that case. In the present case we have an analogous situation, because here it is claimed that some of the services were performed not for the defendant corporation, but for individuals connected with the corporation. Considering all the facts presented by the pleadings and the affidavits, I am of the opinion that it would be impossible for the jury in this case to keep in mind the evidence in regard to each of the items and to give that evidence its proper weight and application, and I therefore grant the motion, with ten dollars costs.

Motion granted, with costs.

ALEXANDER PANEE, Plaintiff, *v.* PEDRO SOLER and Others, Defendants.

(Supreme Court, New York Special Term, December, 1917.)

Aliens — cannot during war prosecute actions in our courts — bill of particulars — pleading.

An alien enemy resident in the enemy's country cannot during the present war prosecute an action in our courts, and where a defendant in a single motion unites a demand for a bill of particulars of plaintiff's claim and a demand that plaintiff be required to state under oath whether at the commencement of the action he was, and whether he now is, a citizen of the German Empire and a subject of the Imperial Government of the Empire of Germany, and to further state the place of residence of plaintiff and, if in the United States of America, the state, city and street address of his residence, together with such other and further relief as may be just, the second branch of the motion will be granted and the first branch denied, but without prejudice to a renewal thereof whenever it is made to appear that the facts are such that the action may proceed.

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MOTION by the defendant Emilio Lopez for a bill of particulars.

A. Stedman Jameson, for motion.

Leo Oppenheimer, opposed.

GIEGERICH, J. The defendant Emilio Lopez has united in a single motion a demand for a bill of particulars of the plaintiff's claim and a demand that "the plaintiff be required to state under oath whether at the time this action was commenced he was and whether he now is a citizen of the German Empire and a subject of the Imperial Government of the Empire of Germany, and to further state the place of residence of the plaintiff, and if in the United States of America the state, city and street address of his residence, together with such other and further relief as may be just." It has long been the established law of this state that an alien enemy resident in the enemy's country cannot, during the war, prosecute an action in our courts. *Rothbarth* v. *Herzfeld,* 100 Misc. Rep. 470, and cases cited. It is plain, therefore, that it is important to the said defendant to have the information which he seeks with respect to the residence and citizenship of the plaintiff. If the situation is as the defendant alleges, and the plaintiff is a non-resident alien, then, clearly, the plaintiff has no standing to prosecute the action during the period of the war. It follows also that the courts should not be asked at this time to determine whether or not the defendant is entitled to a bill of particulars in an action which cannot now be prosecuted. On behalf of the plaintiff the objection is made that information concerning residence and citizenship is not a proper part of a bill of particulars. The present motion, however, does not seek such information as a part of the bill of

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particulars, but is an application independent from the application for a bill of particulars but united in the same motion. I cannot see that any statutory rule or sound principle of practice has been violated by the defendant in the course he has followed. In fact, in the *Rothbarth* case, above cited, it was observed that it was entirely competent for the court to act summarily in such a case, and suspend the further prosecution of the action upon it being established to its satisfaction, by affidavit or otherwise, that the action is being prosecuted by an alien enemy. The case is not one where nice distinctions of practice should be drawn. As a matter of fact, in my disposition of the matter, I have in effect treated it as made solely for information as to residence and citizenship, and have disregarded and refused to pass upon that portion of the motion which asks for a bill of particulars. The second branch of the motion is granted and the first branch is denied, without costs and without prejudice to a renewal thereof whenever it is made to appear that the facts are such that the prosecution of the action can be proceeded with. Motion disposed of as indicated, without costs.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* JAMES C. FITZGERALD, Defendant.

(County Court, Rensselaer County, December, 1917.)

Automobiles — reckless driving on public streets — misdemeanor — Penal Law, § 1938 — General Highway Traffic Law of 1917.

Where the act of defendant in driving an automobile on the public streets of a city at a greater speed than one mile in four minutes was not only in violation of a local ordinance but also violated the provisions of the General Highway Traffic Law

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(Laws of 1917, chap. 655), which prohibits reckless driving and makes the same a misdemeanor, defendant may be proceeded against under either provision of law, but under section 1938 of the Penal Law it is improper to render two different judgments of conviction against him.

APPEAL from a judgment of conviction of the Police Court of city of Troy, rendered July 11, 1917.

John P. Taylor, district attorney, for People.

Melvin T. Bender, for defendant.

RUSSELL, J. This is an appeal from a judgment of conviction of the Police Court of the city of Troy, N. Y., rendered on July 11, 1917, for driving an automobile on a public street in the city of Troy on June 30, 1917, at a greater rate of speed than one mile in four minutes, in violation of a city ordinance passed pursuant to the provisions of section 288 of the Highway Law.* The defendant was sentenced to pay a fine of fifty dollars and to be imprisoned in the Rensselaer county jail until said fine be paid, not exceeding fifty days.

Also from a judgment of conviction of the Police Court of the city of Troy rendered on July 11, 1917, for reckless driving in the city of Troy on the 30th day of June, 1917, in violation of the provisions of section 14 of the General Highway Traffic Law, adjudging that the defendant pay a fine of fifty dollars and be imprisoned in the Rensselaer county jail until said fine be paid, not exceeding fifty days.

In this case there are three questions to be determined:

First. Was the defendant entitled to a written information before the learned magistrate proceeded with the trial?

* See Laws of 1917, chap. 769.— [REPR.

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Second. Did the General Highway Traffic Law of the state of New York repeal the force of the ordinance of the city of Troy with respect to the regulation of the speed of motor vehicles on June 30, 1917?

Third. Did the Police Court of Troy have the power to convict the defendant for a violation of the General Highway Traffic Law and for a violation of the ordinances of the city of Troy with respect to the regulation of speed of automobiles for one and the same act?

The alleged crime was committed in the presence of a police officer of the city of Troy on a public highway within the city of Troy and consequently no written information was necessary. An arrest without a warrant for a crime committed in the presence of a peace officer is permitted by section 177 of the Code of Criminal Procedure. When the defendant was first arraigned the charges were stated by the magistrate. The defendant pleaded not guilty and asked for an adjournment; there was no warrant of commitment pending the adjournment, consequently there was no requirement for a written information pending the adjournment or at the time when the defendant went to trial. *People ex rel. Farley* v. *Crane,* 94 App. Div. 400.

The General Highway Traffic Law, which became a law May 25, 1917, provided that reckless driving is prohibited and further provided that every person violating this provision shall be guilty of a misdemeanor. This same law in section 22, subdivision 4, provided that "Local authorities shall have no power to pass, enforce or maintain any ordinance, rule or regulation in any way in conflict with, contrary to, or inconsistent with the provisions of this chapter, or any general law affecting vehicles which has or hereafter may be enacted, and no such ordinance, rule or regulation of such local authorities now in force or hereafter enacted

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shall have any force or effect, provided that nothing in this chapter shall impair the validity or effect of any ordinance regulating the speed of motor vehicles heretofore or hereafter made, adopted or prescribed by cities of the first class."

Another law was passed June 6, 1917, amending the Highway Law, in relation to motor vehicles, which law provided in section 288 as follows: "that nothing in this article contained shall impair the validity or effect of any ordinances regulating the speed of motor vehicles, or of any traffic regulations with regard to the operation of motor vehicles, heretofore or hereafter made, adopted or prescribed pursuant to law in any city of the first class or in any city of the second class in a county adjoining a city of the first class; provided, further, that the local authorities of other cities and incorporated villages may limit by ordinance, rule or regulation the speed of motor vehicles on the public highways, such speed limitation not to be in any case less than one mile in four minutes, and the maintenance of a greater rate of speed for one-eighth of a mile shall be presumptive evidence of driving at a rate of speed which is not careful and prudent."

The law passed June 6, 1917, amending the Highway Law in relation to motor vehicles superseded the General Highway Traffic Law passed May 25, 1917, and therefore all sections of the General Highway Traffic Law with relation to motor vehicles which were inconsistent with the provisions of the law passed June 6, 1917, were superseded. The provision of the General Highway Traffic Law with respect to the speed of motor vehicles is not inconsistent with the provisions of the law of June 6, 1917, except as to the power of local authorities to pass ordinances regulating the speed of motor vehicles within the limits of a city or an incorporated village. The General Highway Traffic

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Law provided that reckless driving is prohibited, that is all that the said law contains as to the speed of motor vehicles. These words are not inconsistent with the provisions in the law of June 6, 1917, which is as follows: "* * * such speed limitation not to be in any case less than one mile in four minutes, and the maintenance of a greater rate of speed for one-eighth of a mile shall be presumptive evidence of driving at a rate of speed which is not careful and prudent * * *." Since the maintenance of a greater rate of speed than one mile in four minutes for one-eighth of a mile is only presumptive evidence of driving at a rate of speed which is not careful and prudent, it therefore necessarily follows that a motor vehicle may be driven at a greater rate of speed and the presumption that the driver is not careful and prudent may be overcome by the evidence. On the other hand, it cannot reasonably be urged that an ordinance in a city or an incorporated village permitting the driver of a motor vehicle to drive at the rate of one mile in four minutes means that he can drive at said rate at any place if such speed should be reckless and endanger the lives of other people. It is the evident intent of both the law of May 25, 1917, and the law of June 6, 1917, with respect to motor vehicles to prohibit reckless driving and such reckless driving to be determined by the facts and circumstances surrounding each case. It was also the intent of the legislature to give to local authorities the power to pass ordinances in cities and in incorporated villages in this state with respect to the regulation of speed of motor vehicles in said cities and villages. To leave to the discretion of all drivers of automobiles the speed at which they may drive and also to judge whether or not such speed is reckless would be unwise. There are conditions in all cities and in villages which are foreign to strangers

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driving automobiles and for this reason alone local authorities should be vested with the power to regulate the speed of automobiles in their respective cities and incorporated villages.

The trial court proceeded to trial under both the General Highway Traffic Law and the ordinances of the city of Troy and found the defendant guilty of a violation of each. That was improper. The Penal Law states in section 1938: "An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of those provisions, but not under more than one; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision."

There was one act committed by the defendant for which he was arrested. This act was made punishable in different ways and by different provisions of law. The trial court could have properly proceeded under either the General Highway Traffic Law or the ordinances of the city of Troy, but not under both. It was improper to render two different judgments of conviction against the defendant for one and the same offense. For this reason the judgments of conviction should be reversed, and a new trial ordered. *People* v. *Krank*, 110 N. Y. 488.

Judgments of conviction reversed and a new trial ordered.

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Matter of the Final Judicial Settlement of the Accounts of WILLIAM W. WILES and ANNA A. WILES, as Executors of the Last Will and Testament of WILLIAM WILES, Deceased.

(Surrogate's Court, Montgomery County, December, 1917.)

Decedents' estates — negotiable instruments — gifts — wills — insurance (life).

Where it is clear that a promissory note given without a valuable or sufficient consideration was intended by the maker to operate at his death as a gift to the payee, his daughter, of the sum of money therein mentioned, the note is not a valid obligation against his estate, nor does it amount to or effect a valid gift of the money.

Where, however, a provision of the maker's will mentions the note and directs that the proceeds of certain insurance be paid thereon, to the extent of the sum realized upon the insurance policies, the payee is entitled to recover as legatee such amount over and beyond such other provisions as are made for her by the will.

PROCEEDING upon the final judicial settlement of the accounts of executors.

George M. Albot, for executors.

Fred Linus Carroll, for claimant.

MYERS, S. The question presented for determination on the accounting in the above-entitled estate arises upon a claim presented by Emma Wiles Edwards, based upon a promissory note of which the following is a copy:

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"$5000.00

"Six years after date for value received, I promise to pay to the order of Mrs. Geddes H. Edwards, Five Thousand Dollars.

"Dated, FULTONVILLE, *September* 14, 1896.

"WILLIAM WILES."

The claimant and the payee named in said note are one and the same person. A verified claim for the amount stated in said note was presented by the payee named therein, and rejected by the executors.

The facts relating to the giving of said note are undisputed, and are these: On the day on which said note bears date, William Wiles, the father of the claimant, came to her and asked her for five cents. She told him she did not have it, but had a quarter, whereupon her father then asked her to give that to him, which she did, and he then handed to her the note in question saying that he wanted the money in order to make it binding. That at that time she was visiting in Fultonville, her home being in St. Louis. That at that time her father was owing her no money, and she had rendered him no services, and prior thereto her father never suggested to her the giving of such note and she had never thought of his doing so.

That no business transaction had taken place between her and her father previous thereto. That at the time of giving the note there was some talk about its payment, and that she understood it was to be paid after his death. That the note remained in her possession from that time, with the exception that on three occasions, viz., August 6, 1902, August 27, 1908, and August 26, 1914, her father had the note and indorsed thereon a renewal in each case in the following words: "I renew the within note with the understanding there is to be no interest on the same," which renewal in

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each case was signed by said maker. The note was rejected and is contested on the ground of failure of sufficient consideration for its making and delivery, and that it was intended only to operate as a testamentary act.

It is clear that there was no valuable consideration for the making and delivery of the note beyond the twenty-five cents, and it is clear that the passing of said sum between the parties was not considered by either as the actual consideration for the making of the note, but was intended as a mere form thought by the maker necessary and sufficient to make the note valid.

The payee understood at the time that the note was given to her because her father had previously advanced to her brother some money. The father no doubt felt under some moral obligation to provide for this daughter to the extent of the amount of the note, but does not appear to have been under any legal obligation to pay her such sum, or any sum whatever. The note appears on its face to have been given for "value received," but the presumption arising from such recital is overcome by the undisputed facts, and the consideration for the making and delivery thereof accordingly was meritorious only.

I think the rule may be stated to be that where a party is under no legal obligation to pay money to another, and there is no valuable consideration for the promise to do so, a contract or an agreement to pay will not be rendered valid by putting it in the form of a promissory note.

The delivery of the note was intended to work as a gift at some future date of the sum of $5,000. It amounted simply to a promise of Mr. Wiles to pay at such time such sum (as between the parties the time of such payment was intended to be after the maker's death). The rule respecting such a transaction, based

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upon a meritorious consideration only, was laid down in *Harris* v. *Clark,* 3 N. Y. 93, in which it was stated: "That a voluntary promissory note without consideration is not, as the law now stands, the subject of a valid gift by the maker, either as a present donation or as a gift to take effect at the death of the donor," and the general principle is well established that "In no case whatsoever will courts of equity interfere in favor of mere volunteers, whether it be upon a voluntary contract, or a covenant or a settlement, however meritorious may be the consideration, and though they stand in relation of wife or child." Story Eq. Juris. § 1148. The law seems well settled that a meritorious consideration, or the duty even to provide for a wife or child, is not sufficient to support an executory contract. The note in question amounted simply to a promise to pay and was an executory contract only, and such voluntary promise cannot be enforced against the doner in his lifetime, nor after his death against his executors or administrators. This rule is supported in the matter of *Whitaker* v. *Whitaker,* 52 N. Y. 368, and has been followed.

The law seems also to be well settled that natural love and affection do not constitute a sufficient consideration to support an executory contract, and that the purpose of equalizing the distribution of the maker's estate among his children is not sufficient consideration for the making of a note. This was so stated in *Hadley* v. *Reed,* 34 N. Y. St. Repr. 949.

The note in question being without a valuable consideration, or any consideration sufficient to make it a valid claim against this estate, the claimant can have no standing as a creditor against her father's estate.

The note in question was clearly intended to operate as a gift, at the death of the maker, of the sum stated therein. If the note had been one held by the father

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against the daughter, or a note held by him against a third person, the delivery thereof by him to the claimant would undoubtedly have satisfied the elements necessary to constitute a valid gift, but the mere delivery by him of an instrument without a valuable consideration, whereby he promised to pay at a future date, did not amount to such a gift of the sum intended to be given as would satisfy the legal requirements necessary to complete a gift. While the intention of the donor was to give to claimant the sum of money mentioned, there was lacking a present delivery thereof with a renunciation by him of dominion and control thereover. This act on his part amounted to nothing more than an attempt to effect a testamentary provision, and in that respect was ineffectual and void and must fail in that respect also for want of observance of the statutory requirements necessary for the making and attesting of a last will and testament.

The case of *Ferry* v. *Stephens,* 66 N. Y. 321, cited by claimant in support of her claim, is not in point, for in that case claimant entered into a contract for the purchase of real estate and obligated herself to pay a stipulated sum of money, but during the lifetime of the other party to the contract he receipted in full to her for the purchase price, the court holding that the contract did not operate as a gift of the land, but the receipt operated as a valid and complete gift of the debt, freeing the second party from obligation to pay the sum and entitling her to the right of conveyance as though she had in fact paid. In that case it was held the contract no longer remained executory.

I am unable to hold that the note in question operated as a valid gift to the claimant of $5,000, and consequently cannot consider seriously the contention of the claimant that it did and that the maker during his

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lifetime occupied the position of a trustee, holding said sum only in trust for her.

It is further contended by the claimant that it was the unquestioned intention and purpose of the decedent that the claimant should be paid $5,000, and that this intention should be carried out. The intention of the decedent would be given serious consideration and would be of considerable weight in construing an instrument which might be legitimately held to be a will, but in the case of the note in question the question of the intention of the maker cannot and does not enter.

I must hold that the note in question having been given without a valuable or sufficient consideration is not a valid obligation against the estate of William Wiles, and neither did it amount to nor effect a valid gift of the sum mentioned therein.

The decedent by the 2d paragraph of his last will and testament mentions the note in question, and directs that the proceeds of certain insurance policies be paid thereon. It appears that the sum realized upon the policies mentioned amounted to $2,163.03, and I find and hold that to the extent of such amount the claimant is entitled to recover as a legatee under said will, over and beyond such other provisions as are made for her therein. The decree may provide accordingly.

Decreed accordingly.

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MEMORANDA

OF

DECISIONS AFFIRMED BY THE APPELLATE DIVISION ON THE OPINION OF THE LOWER COURT AND NOT PREVIOUSLY REPORTED.

ANSELMO BELOTTI, Plaintiff, *v.* ANDREW BICKHARDT et al., Defendants.*

(Supreme Court, Bronx Special Term for Trials, June, 1916.)

Equity — action to compel removal of substantial structure encroaching about twelve feet on plaintiff's land — ejectment not adequate relief — damages — rental value of land considered as vacant property.

Charles P. Hallock, for plaintiff.

Lockwood & Lockwood, for defendants.

MULLAN, J. The plaintiff in this action seeks the aid of equity to recover possession of land, to compel the removal of a building alleged to encroach thereon to the extent of about twelve feet and to obtain compensation for the use of the land encroached upon. I had decided upon a motion made prior to the trial that, assuming the facts were as alleged in the complaint, the plaintiff should not be compelled to enforce his rights by a suit at law in ejectment, for the reason that, because of the very considerable encroachment of a substantial structure, it was doubtful whether he could obtain adequate relief in that form of action. The plaintiff is the record owner of a certain lot of

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*Affirmed by the Appellate Division, First Department, at the October, 1917, term.—[REPR.

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land situate in the borough of The Bronx, city of New York, on the easterly side of Webster avenue, between Scribner street and Gun Hill road. In the several deeds of conveyance in the chain of title the lot is described as lot K on a certain filed map made by one Josiah Briggs. The westerly boundary of the lot is therein referred to as Webster avenue, and the description contains the statement that the lot "includes as much of Berrian avenue as lies in front of this lot and will become a part thereof on the opening of Webster avenue." About twenty feet in depth of the front of lot K was in the bed of Berrian avenue, a street which was to be discontinued upon the opening of Webster avenue, which opening took place in 1897. Prior to that time, *i. e.*, in May, 1892, one Van Schaick, the then owner of three lots adjoining lot K on the south, designated as lots H, I and J on the Briggs map, erected a building which extended from the rear of the lots to the easterly side of Berrian avenue. The building thus erected actually encroached about twelve feet upon lot K. In December, 1892, Van Schaick conveyed the three lots H, I and J to one Reidel, who went into occupancy of the premises and used the building in question as a saloon and road house. In 1897, when Webster avenue was legally opened and Berrian avenue closed, Reidel raised the building to conform to the grade of Webster avenue and added an extension westwardly over the discontinued avenue to the new easterly line of Webster avenue. This addition to the building likewise encroached toward the north twelve feet upon that portion of lot K which lay in the bed of Berrian avenue until it was closed. Reidel died in 1898, and in 1906 his heirs conveyed said lots H, I and J to the defendant Bickhardt. No part of lot K was in terms conveyed by the deed to Bickhardt. Bickhardt went into possession of the lots so conveyed,

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at the same time taking possession of the entire building, including the addition. The principal contention of the defendant Bickhardt is that his possession of the southerly twelve feet of lot K upon which the building stands has ripened into a prescriptive right by virtue of a continuous adverse possession since 1892, made up by (a) the possession of Reidel from 1892 to 1898, (b) the possession of Reidel's heirs from 1898 to 1906, and (c) Bickhardt's possession from 1906 to the inception of this action in 1914. The defendants, having no record or paper title to the *locus in quo,* must show, in order to sustain their contention, that the possession relied upon was adverse, as that term is used in sections 371 and 372 of the Code and that there was privity of estate or contract between the successive possessors. I find no evidence in the record of any intention on the part of Reidel or his predecessors in title to take possession of any portion of lot K other than such as may be inferred from the fact of possession alone. On the contrary, the evidence makes it clear that the encroachment was not intentional but accidental, and was due to an error made in an old sketch map erroneously locating lots H, I and J in a position which disclosed no encroachment upon lot K, which faulty map appears to have been very generally followed, even the tax map of the city of New York until quite recently containing this erroneous location. Adverse possession, however, even when held by mistake or through inadvertence, may ripen into a prescriptive right after twenty years of such possession (*Crary* v. *Goodman,* 22 N. Y. 170; 3 Washb. Real Prop. [6th ed.] 130), the actual physical occupation and improvement being in a proper case sufficient evidence of the intention to hold adversely. *Barnes* v. *Light,* 116 N. Y. 34.

In the *Crary* case Judge Selden, in writing for the court, said: "The doctrine of the courts, therefore, evidently is that where a grantee, in taking possession

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under his deed, goes unintentionally and by mistake beyond his proper boundaries, and enters upon and actually occupies and improves land not included in the deed, claiming and supposing it to be his, this occupation is to be deemed adverse within the meaning of the statute of limitations, and if continued for twenty years will bar the right of the true owner." Although the matter is by no means beyond doubt, I incline to the view that the possession of this part of the *locus in quo* may be considered adverse in character, but I am not required to pass upon that point for reasons hereinafter stated. As to the encroached upon portion of lot K that formerly was part of Berrian avenue, I think the use made of it by Reidel and his successors may be considered in the circumstances to have been adverse under subdivision 2 of section 372 of the Code. Assuming that as to any part of the encroaching structure the defendants have in other respects sufficiently proved adverse possession, there remains the question of privity. There was, of course, privity of estate between Reidel and his heirs, and that brings the possession from 1892 to 1906. In that year lots H, I and J were conveyed to the defendant Bickhardt by Reidel's heirs. No privity of estate existed between the grantors and the grantee, and unless there was privity of contract between them with respect to the *locus in quo* the subsequent possession cannot be tacked on to the previous possession. The deed to Bickhardt, however, not only failed to include any portion of lot K, but specifically described the northerly boundary of the property conveyed as lot K, thus expressly excluding any portion of the true lot K from the conveyance. *Staples* v. *Schnackenberg,* 148 App. Div. 161; *Ridley* v. *Walter,* 153 id. 65. As there was no privity of contract between the heirs of Reidel and the defendant Bickhardt with respect to lot K, Bickhardt's subsequent possession cannot be tacked on to the former possession to make up the necessary

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adverse possession period of twenty years. *Smith* v. *Reich,* 80 Hun, 287; affd. on opinion below, 151 N. Y. 642; *Staples* v. *Schnackenberg, supra.* The separate possessions were considerably insufficient in themselves to support a prescriptive right. The defendants also place reliance upon those authorities holding that the record owner of land may in certain cases lose his right to property through acquiescence in a boundary location. *Baldwin* v. *Brown,* 16 N. Y. 359; *Vosburgh* v. *Teator,* 32 id. 561; *Miner* v. *Mayor,* 37 N. Y. Super. Ct. 171. It is quite true that the plaintiff's predecessors in title fell into the same error with respect to the true lines of lot K as did Bickhardt's predecessors, but I do not think that the rarely asserted and somewhat anomalous doctrine of the practical location of boundary cases has any proper application here, where the parties did not intend to settle a doubtful boundary line, as they did not know there was any question as to where the true line was. Plaintiff seeks to obtain the rental value of the twelve-foot strip, with so much of the building as covers it. I think he is entitled to the rental value of the land considered as vacant property and to no more. The proof was that the use of the land for the period of plaintiff's ownership is reasonably worth $108.44, and this amount I shall allow. Even in an ejectment action the plaintiff would not be entitled to the rental value of the buildings. Code Civ. Pro. § 1531. Defendants offered in evidence a deed from the Reidel heirs, dated April 24, 1916, purporting to release the part of lot K in question. This paper is of no service to them, as it was void for champerty (*Crary* v. *Goodman, supra*), was made after the termination of the dispossession, and therefore after the possession is deemed to have been returned to the true owner (*Staples* v. *Schnackenberg, supra*), and was made after the filing of the *lis pendens* herein. As the plaintiff elected to come into equity, in awarding him the relief he seeks I shall have

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regard for the situation of the defendants. The decree shall therefore contain a provision allowing them a reasonable time in which to remove their building. As to what would be a reasonable time I shall accept suggestions from both sides.

Ordered accordingly.

Matter of the Application of WILLIAM A. PRENDERGAST, as Comptroller of the City of New York, for a Writ of Mandamus, Peremptory or Alternative, *v.* JOHN P. COHALAN and ROBERT LUDLOW FOWLER, as Surrogates of the County of New York.*

(Supreme Court, New York Special Term, January, 1917.)

Mandamus — compilation of statistical records — Greater New York Charter, § 149a does not apply to the surrogates of the county of New York.

MOTION for a writ of mandamus.

Lamar Hardy, corporation counsel, for relator.

Arthur T. O'Leary, for John P. Cohalan.

Robert Ludlow Fowler, attorney in person.

GREENBAUM, J. This is a motion made on behalf of the corporation of the city of New York for a writ of mandamus directed against the surrogates of the county of New York to compel them to cause certain statistical records to be compiled and maintained in their office in respect to the time required to perform the different functions of that office by various employees therein, as well as the unit cost of performing such functions. The relator bases his application upon

*Affirmed by the Appellate Division, First Department, at the June, 1917, term.—[REPR.

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the proposition that a ministerial act is imposed upon the surrogates within the provisions of section 149a of the Greater New York Charter to install and maintain in their office the system of statistical records required by the comptroller. Section 149a, *supra,* omitting such portions thereof as are irrelevant to this discussion provides: "Every official or employee of the city, or of the counties included within the City of New York, and every board or commission charged by law or by due authority with the custody of property of the City of New York or the counties thereof * * * or services performed, by or on behalf of the City of New York or the counties therein, or the disbursement or receipt of moneys from the city or counties therein, and every person, official, board, commission or corporation receiving or disbursing moneys from the city or counties therein for public purposes shall at such times, under such conditions, and in the manner directed to do so by the comptroller, furnish reports of facts relating to any or all of said property * * * or of (*sic*) said work or said services, or of the receipt or disbursement of said moneys * * * and shall compile and maintain in their respective offices such systems of statistical record as the comptroller may require appertaining to all matters referred to in this section." The inquiry, therefore, is whether section 149a of the charter is applicable to the surrogates of New York county. Clearly the respondents are not city officials, since they cannot be charged with the performance of any administrative or other functions related to the city government. Nor are they county officers. A county officer is one through whom the county performs its usual political or governmental functions. 11 Cyc. 414, subd. D, citing *County Board of Supervisors, etc.,* v. *Parker,* 3 Wall. 93, U. S. Sup. Ct. The respondents are judicial officers of the state (*London* v. *Mayor,* J. & S. 46, and *Matter of Runk,* 200 N. Y. 453–456), and Surrogates' Courts are

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expressly recognized in article VI, section 15, of the New York State Constitution. The clerks, assistant clerks and attendants of the Surrogate's Court are also state officers. *Olmstead* v. *Meahl,* N. Y. L. J. Dec. 2, 1916. Nor do the respondents come within the language of the charter provision above quoted, which refers to "every person, official, board, commission or corporation receiving or disbursing moneys from the city or counties therein for public purposes," since they do not receive any moneys for public purposes, excepting their own salaries, which the relator concedes has no relation to the statistics desired, nor do they disburse moneys for the city or any of the counties therein. That the legislature never intended to include the Surrogate's Court in the charter provisions upon which the relator relies is further made evident by chapter 775 of the Laws of 1911, which expressly provides that "the board of estimate and apportionment of the city of New York shall cease to have or exercise any powers in regard to the appointment, * * * number and salaries of assistants to such surrogates, or of other clerks, employees or subordinates in or attached to the office of said surrogates, or in regard to the receipt or payment of fees in said office." This act further confers upon the surrogates the power of appointment and removal of all clerks, officers, attendants and employees in their office or connected with the court, and the right to fix the number, duties and compensation of said appointees, and provides that the compensations thus fixed shall be a county charge. In view of the plain provisions of the charter and the statutes just quoted the relator is not required to compile and furnish the statistical data which he has demanded of the respondents, and the latter, of course, are not obliged to furnish such data.

Application denied.

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Matter of the Application of CHARLES L. BROOKS to Review the Action of the Inspectors of Primary Election of the Town of Edinburgh, in the County of Saratoga, N. Y., at the Republican Primary Election of September 19, 1917, and for Other Relief.*

(Supreme Court, Saratoga Special Term, September, 1917.)

Election Law — section 56 — action of inspectors of election in counting as valid certain marked ballots — ballots so marked held invalid by Court of Appeals.

APPLICATION under section 56 of the Election Law to review the action of the inspectors of election of the town of Edinburgh, Saratoga county.

Butler, Kilmer & Corbin and Lawrence B. McKelvey, for petitioner.

Benjamin P. Wheat, Hiram C. Todd and Nash Rockwood, for respondent.

WHITMYER, J. Petitioner is applying, under section 56 of the Election Law, to review the action of the inspectors of election of the town of Edinburgh, Saratoga county, N. Y., in counting twenty-one ballots as valid for W. E. Snow for member of the Republican county committee from said town. Each of said ballots shows Snow's name in the blank space under the title of said office or position and also shows a cross mark in the darkened square to the left of the name. His name was not printed upon the ballot. The Court of Appeals, in the case of *People ex rel. Brown* v. *Board of Supervisors, Suffolk County,* 216 N. Y. 732, reversing the decision of the Appellate Division, second

*Affirmed by the Appellate Division, Fourth Department, at the September, 1917, term.—[REPR.

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department, reported in 170 App. Div. 364, 367, has decided that ballots so marked are invalid. Respondent claims that the decision there is not applicable here, because it arose out of a general election, and that this case is controlled by *Matter of Garvin,* 168 App. Div. 218, 222, which arose out of a primary. The *Brown* case does not refer to the *Garvin* case. Section 358 of the Election Law relates to general elections. It provides, in effect, that a voter, to vote for any candidate not on the ballot, "shall" write the candidate's name on a line left blank in the appropriate place. Sections 82 and 86 relate to primaries. Section 82 provides that it shall not be lawful to make any mark on a ballot other than a cross X mark for the purpose of voting and only in the voting space to the left of the name of the candidate, except that the voter "may" write with a pencil having black lead in the blank space under the title of the proper office or party position the name of any person or persons for whom he desires to vote, whose name or names are not printed upon the ballot. And section 86 defines a void ballot and states that it is one, among others, upon which anything is written other than the name or names of any person or persons not printed upon the ballot for whom the voter desires to vote, which "must" be written in the blank space under the title of the proper office or party position with a pencil having black lead. Section 358 uses the word "shall," section 82 the word "may" and section 86 the word "must." But sections 82 and 86 must be construed together, in determining the meaning of the law, so far as it relates to primaries, and, when they are, it is clear that the language is as strong in the one case as it is in the other. And the law does not, in terms, permit a mark in the square, in addition to writing in the name, in either case. Moreover, the directions for voting at primaries and elections are substantially the same and there can be no reason for a distinction. Finally, it

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should be observed that the ballots in dispute relate to the office of county committeeman and that the primary is the place for the election, not the nomination, of such an officer. For these reasons, hastily stated, it seems to me that the decision of the Court of Appeals in the *Brown* case is controlling here. A request for another primary election in this district for county committeeman has been made. That can be directed only in the case of fraud. The result here was due to lack of knowledge of the law or to mistake. That being so, I have no power to grant the request. It seems to me that the petition must be granted.

Ordered accordingly.

THE EMBALMERS SUPPLY COMPANY, Respondent, *v.* FRANK H. ROWE, Appellant.*

(County Court, Cattaraugus County, June, 1917.)

Appeal — judgment rendered by justice of the peace — defendant not served with copy of verified complaint — verification by attorney not complying with section 526 of Code of Civil Procedure.

APPEAL from a judgment rendered by a justice of the peace in favor of plaintiff.

Lynn R. Van Vlack, for appellant.

W. Darwin Phelps, for respondent.

DOWD, J. This is an appeal from a judgment rendered by a justice of the peace on the 8th day of April, 1916, in favor of the plaintiff and against the defendant. The action was begun by the plaintiff to recover

*Affirmed by the Appellate Division, Fourth Department, at the September, 1917, term.—[REPR.

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the purchase price of a quantity of goods alleged to have been sold by the plaintiff to the defendant.

The summons herein was issued and served personally on the defendant on the 4th day of March, 1916, as appears by the certificate of the constable. On the return day of the summons the defendant appeared "specially" and demanded that the plaintiff file security for costs. The court held that the plaintiff must give security for costs in the sum of $350, and that such security be filed with the court on or before April 8, 1916, and all proceedings be stayed until such time. As appears from the return of the justice, on the 24th day of March, 1916, a surety bond was filed on behalf of the plaintiff, and on April 8, 1916, the plaintiff appeared by its attorney. The defendant did not appear, and the justice, without taking any testimony or requiring any proof, rendered a judgment in favor of the plaintiff and against the defendant for $21.80 damages, and $2.15 costs. The justice's return recites: "Having proof of service of the summons on the defendant, I hereby render judgment," etc.

The defendant challenges the validity of this judgment upon several grounds, two of which only the court deems necessary to consider:

First. The defendant asserts that the justice had no authority to render judgment, for the reason that there was no proof before the justice at the time the judgment was rendered that a copy of the verified complaint had been served on the defendant. An examination of the original return of the constable as contained in the return shows that there was no proof, either by affidavit, certificate or otherwise, before the justice, at the time he rendered the judgment, that a copy of the verified complaint had been served upon the defendant. For this reason alone, the judgment must be reversed. *International Seed Co.* v. *Hartmann,* 65 App. Div. 478.

Second. The defendant also urges that if the jus-

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tice had had before him proof of service of the summons and verified complaint upon the defendant the complaint attached to the return herein does not contain a proper verification. The verification is made, not by the plaintiff, but by Mr. Phelps, attorney of the plaintiff, and the verification does not comply with the provisions of section 526 of the Code of Civil Procedure. Section 526 of the Code of Civil Procedure provides as follows: "The affidavit of verification must be to the effect, that the pleading is true to the knowledge of the deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. Where it is made by a person, other than the party, he must set forth, in the affidavit, the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why it is not made by the party."

In the affidavit attached to the complaint there is no reason set forth why the affidavit is not made by the plaintiff or some officer of the plaintiff, and there are set forth no grounds for the belief of the affiant.

Section 528 of the Code of Civil Procedure provides: "The remedy for a defective verification of a pleading is to treat the same as an unverified pleading."

The complaint in this case not having been properly verified, the justice should have treated it the same as though the pleading was unverified, and before entering judgment should have required proof of the plaintiff's claim against the defendant.

For the reasons above stated, the judgment herein is reversed.

Judgment reversed.

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MARION L. EVANS, as Executrix, etc., Plaintiff, *v.* SUPREME COUNCIL OF THE ROYAL ARCANUM et al., Defendants.*

(Supreme Court, Oneida Trial Term, June, 1915.)

Benefit societies — amendment to by-laws as to monthly payments — controversy as to amount due under benefit certificate.

ACTION to determine a controversy.

Lee & Dowling, for plaintiff.

Howard C. Wiggins, for defendants.

CROUCH, J. The facts in full are concisely set forth in the agreed statement upon which the case is submitted.

This action is not brought to recover money claimed to be due under the benefit certificate issued to plaintiff's testator. The executrix as such concededly has no interest in the proceeds of such certificate.

The object of the action as originally brought by Evans, and as continued by the substitution of his executrix as plaintiff, is to determine a controversy between the parties concerning the amount of the monthly payment to be made by the member under the contract. By virtue of amendments to its by-laws made by defendant society in 1905, Evans was required to pay six dollars and thirty-three cents each month until he attained the age of sixty-five years and thereafter sixteen dollars and eight cents per month. He became sixty-five in February, 1913. At the time the 1905 amendments were adopted the monthly assessment which Evans was bound to pay was three dollars and forty-four cents.

Claiming that the increased assessments were

*Affirmed by the Appellate Division, Fourth Department, November 21, 1917.—[REPR.

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invalid and void as exceeding the powers of the corporation and because conflicting with his contract rights, Evans paid them each month down to October, 1913, under protest and reserving all rights and privileges to which he might be entitled under the laws of this state.

In October, 1913, Evans tendered as the assessment for that month both the sum of three dollars and forty-four cents and the sum of six dollars and thirty-three cents. Such tenders were refused upon the ground that the amount due was sixteen dollars and eight cents; and the defendant notified Evans that unless he paid the latter sum "he would be suspended as a member of said defendants and would lose all the moneys paid by him to such defendants and any and all the benefits accruing by and under the by-laws of the defendants."

Here were all the elements of a genuine controversy. On one hand, Evans' position was sustained by what was then the settled law of this state laid down in a long line of decisions by the Court of Appeals, the latest of which, *Green* v. *Royal Arcanum*, 206 N. Y. 591, had then been handed down only a few months before and involved this very contract. On the other hand, defendants' contention was sustained by the law of Massachusetts, its corporate domicile.

Evans had the right to have the controverted question judicially determined.

He accordingly commenced this action for that purpose on the 30th day of October, 1913, by the service of a summons and complaint, affidavit, undertaking and temporary injunction upon defendant. An answer was interposed and the case, thus at issue, slumbered pending the decision of the appeal to the United States Supreme Court which had been taken in the *Green* case. That decision came in June, 1915, and sustained the contention of defendant. Meanwhile, and on March 23, 1915, Evans had died.

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Subsequently, his executrix was substituted as plaintiff and a supplemental complaint was served under an order of this court, the original answer standing as the answer thereto.

The final decision in the *Green* case disposes of the question involved in this action as originally brought. There remains for decision simply the question whether, under all that was done and omitted to be done since the commencement of this action, Evans' contract is alive or dead. Must the judgment be that, upon payment by plaintiff of the monthly assessment from and including October, 1913, to the date of Evans' death at the rate of sixteen dollars and eight cents, the contract be adjudged in good standing; or that, because of Evans' failure to pay or tender the monthly sum of sixteen dollars and eight cents, now adjudged to be the legal and valid rate, the contract was forfeited and all benefits thereunder totally lost?

The contract provided that suspension from or a voluntary severance of connection with the order should forfeit all rights; also, that a member failing to pay a regular assessment within the time limited should stand suspended. Hence, it is argued that, as Evans did not pay or offer to pay the assessment now determined to have been legal and valid, he stood suspended and thereby forfeited all rights. If that be so, there can be no question under the array of authorities cited that this court cannot grant relief by reinstating the forfeited contract. But I have been cited to no authority holding that a court of equity, in a fair dispute where there is reasonable doubt as to the rights of the parties, cannot upon such terms as will prejudice neither hold their relations in *statu quo* pending decision. On the contrary, there is some intimation from worthy sources that such power exists and may properly be used in such a case. *Langan* v. *American Legion of Honor*, 174 N. Y. 266; *Makman*

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v. *Independent Order Free Sons of Judah,* 86 Misc. Rep. 13.

It is probably true that a member must, as one of the cases puts it, preserve his insurance *cum onere.* But that burden may perhaps be borne otherwise than by compliance with the society's contention on the disputed point, with restitution if that contention prove wrong. It may conceivably be borne, as it was here, by a bond conditioned to secure the society from any loss. Under that bond, the ultimate payment to the defendant of all assessments was secured. If defendant deemed itself insecure, the court could at any time upon application add to such security, even perhaps to the extent of requiring plaintiff to make the payments in the amount contended for by defendant with provision for restitution. But no such application was made.

The plain object of the injunction order was to preserve the subject matter and to maintain the *status quo.* I think its language was appropriate for that purpose.

If the court had power to make that order, then its object was attained. The reasons which have constrained equity to hold that "delinquency cannot be tolerated or redeemed except at the option of the company" (*New York Life Ins. Co.* v. *Statham,* 93 U. S. 24) do not obtain here. There was no delinquency. Plaintiff, with the membership contract in full force and offering to do equity, comes into a court of equity to have a fair dispute adjudicated. The court is in a position to preserve and protect every essential of the contract and every right thereunder of the parties to it.

My conclusion is that judgment should go for plaintiff. Findings and decree to be agreed upon or settled upon notice.

Judgment accordingly.

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JOSEPH GORDON, Plaintiff, *v.* AUTOMOBILE CLUB OF AMERICA, HEDDEN CONSTRUCTION COMPANY and MILLER, DAYBILL & Co., Defendants.*

(Supreme Court, New York Special Term, September, 1916.)

New York city — Building Code, § 22 — ratification and confirmation by amended charter of 1901 — building excavations — support of adjoining walls.

DEMURRER to complaint.

Leo Oppenheimer, for plaintiff.

Carter, Ledyard & Milburn, for defendants.

GREENBAUM, J. The defendant Automobile Club of America demurs to the plaintiff's complaint for failure to allege a cause of action. For a first cause of action the complaint alleges that plaintiff's assignor, the United States Leasing and Holding Company, is the lessee of certain lots of land, with the buildings thereon, known as Nos. 236 and 238 West Fifty-fifth street, in the borough of Manhattan; that under the lease the lessee was obliged to make all repairs to the inside of said buildings; that one Sarah J. Wyckoff Bent is the owner of the lot of land of the approximate width of twenty feet adjoining plaintiff's leased premises on the westerly side thereof and known as 240 West Fifty-fifth street; that adjoining said last named premises on the westerly side thereof the defendant Automobile Club of America is the owner of certain lands upon which it caused excavations to be made to a depth of more than ten feet for the purpose of constructing a building thereon; that for the purpose of preserving and protecting the wall or walls of the building of said Bent, pursuant to a request made under section 22 of the Building Code of the city of New York, it entered upon the premises of said

*Affirmed by the Appellate Division, First Department, November 9, 1917.—[REPR.

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Bent with her consent and in connection with said excavation made upon its premises it also caused an excavation to be made upon the Bent premises to a depth of more than ten feet below the curb, and did not request permission as required by section 22 of the Building Code to enter upon the premises Nos. 236 and 238 West Fifty-fifth street for the purpose of protecting the walls and the building thereon, and failed to support the said walls by proper foundations. The plaintiff then alleges injury to said building in the listing of its wall, due to the defendant's omission of its duty under section 22 of the Building Code and the consequent cracking and falling of the ceilings, walls and plastering to such an extent that the premises were rendered unsafe and resulted in a loss of rentals of various apartments for all of which damages in a substantial sum are demanded. Under the common law an owner of land with a building thereon was not entitled ordinarily to have the walls of his building protected by one causing an excavation to be made on adjoining land. *Dorrity* v. *Rapp,* 72 N. Y. 307. In 1855 the common-law rule was modified by legislative enactment, and from time to time thereafter various amendments were made to the statute until the adoption of the New York City Building Code, now in force, which was ratified and confirmed by the amended charter of 1901 (Laws of 1901, chap. 466, § 407), thus giving it the force and effect of statutory law. *City of Buffalo* v. *New York, L. E. & W. R. R. Co.,* 152 N. Y. 276; *City of Rochester* v. *Simpson,* 134 id. 414. For the history of the legislation on this subject in this state and for the law and authorities bearing upon the interpretation of section 22 see the opinion of the referee in *Baxter* v. *York Realty Co.,* filed with the judgment roll (affirmed in 128 App. Div. 79, and 198 N. Y. 521). The theory of plaintiff's complaint is that the demurring defendant's act in causing an excavation to be made upon Mrs. Bent's land

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for the purpose of protecting the building upon her land imposed a further duty upon this defendant to protect the walls of the building standing upon Nos. 236 and 238 West Fifty-fifth street. The defendant insists that, since its obligations are limited by the provisions of section 22 of the Building Code, there is nothing in the enactment which requires it to protect the walls of a building situated upon a plot of land that is separated from its own land by the intervening land and building of Mrs. Bent. The rights of the parties depend upon the interpretation to be given to section 22 of the Building Code. That section provides *inter alia* that "the person or persons causing such excavation to be made shall, * * * if afforded the necessary license to enter upon the adjoining land, and not otherwise, at his or their own expense, preserve any adjoining or contiguous wall or walls, structure or structures, from injury and support the same by proper foundations, so that the said wall or walls, structure or structures, shall be and remain practically as safe as before such excavation was commenced. If the necessary license is not accorded to the person or persons making such excavation, then it shall be the duty of the owner refusing to grant such license to make the adjoining or contiguous wall or walls, structure or structures, safe and support the same by proper foundations, so that the adjoining excavations may be made and shall be permitted to enter upon the premises where such excavations may be made for that purpose, when necessary." The distinctive use of the adjective "adjoining" in conjunction with the adjective "contiguous," indicates that the obligation extends not only to a wall or structure which touches the excavation, but also to a wall or structure which is "contiguous," *i. e.*, "near to" or "in close proximity to," definitions etymologically recognized and which have received judicial sanction. *Baxter* v. *York Realty Co., supra; Arkell* v. *Commerce*

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Ins. Co., 69 N. Y. 191; *State* v. *Superior Court*, 106 Pac. Rep. 481. The ordinance is an extension of the common-law doctrine of lateral support of land in its natural state to land burdened with buildings and improvements, and should be construed in the light of the principles governing rights and liabilities arising under the common-law doctrine. Under the common law, liability for injury to lateral support of land was not restricted to damage inflicted upon land of an adjoining owner, but included injury to any land within the natural zone of support (*Birmingham* v. *Allen*, L. R. [6 Ch. Div.] 284; *Murray* v. *Pannoci*, 64 N. J. Eq. 147, 154), and might be enforced against an owner, his agent or licensee, or any other person by whom the injury was caused. *Gilmore* v. *Driscoll*, 122 Mass. 199. In this case, however, an excavation was made upon land adjoining that of plaintiff's assignor exceeding ten feet in depth, and such excavation under the terms of the ordinance, as judicially construed, adjoined or was contiguous to the building in question. *Baxter* v. *York Realty Co.*, *supra*. The case, therefore, apart from the support of the analogous common-law principles just discussed, falls directly within the terms of the ordinance, and if the effect of such excavation was to deprive the land of the plaintiff's assignor of its natural support so as to injure the building thereon, the defendant was bound to furnish adequate support to protect it from injury. The ordinance imposes a duty upon the person causing the excavation to be made, and, hence, any person having a special interest in its observance is entitled to sue for damages sustained by its violation. *Willy* v. *Mulledy*, 78 N. Y. 310. Similar considerations dispose of the second cause of action, the allegations of which (saving the additional charge of negligence) are essentially the same as those of the first cause of action. It follows that the demurrer of the defendant Automobile Club of America must be overruled. For the reasons stated

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in the opinion upon the decision of the previous demurrer of the defendants Hedden Construction Co. and Miller, Daybill & Co. (N. Y. L. J., Sept. 14, 1915), the demurrer of these defendants must be sustained.

Demurrer sustained.

JOESPH B. MARTINDALE and Another (MILLS & GIBB), Plaintiffs, *v.* CHARLES DEKAY, Defendant.*

(Supreme Court, New York Trial Term, March, 1917.)

Negotiable instruments — action on corporation check brought by receiver of foreign corporation — measure of defendant's liability — no rights of creditors involved.

ACTION to recover upon a check.

White & Case, for plaintiffs.

Sobel & Brand, for defendant.

GREENBAUM, J. The plaintiffs, as receivers of Mills & Gibb, a New Jersey corporation, vested with power to prosecute actions in behalf of the corporation for the protection and preservation of its assets, bring this action to recover the proceeds of a certain check for $1,000, dated December 21, 1911, made by the corporation through its treasurer, William T. Evans, to the order of the defendant and drawn on the Chemical National Bank of the City of New York. It is alleged that the defendant received this check and the proceeds thereof on account of and in discharge of a personal obligation of William T. Evans and "that by means of said check the said William T. Evans wrongfully and unlawfully withdrew $1,000 of the funds of Mills & Gibb from the said Chemical National Bank of the City of New York and applied the same to his own personal use" and that the "defendant had and

*Affirmed by the Appellate Division, First Department, November 9, 1917.—[REPR.

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received the said $1,000 to and for the use of said Mills & Gibb."

The facts are undisputed. It appears that Mills & Gibb became incorporated in 1900, when it succeeded the copartnership known as "Mills & Gibb." In 1911, when the check in suit was made, one H. Elmer Gibb was president of the corporation, William T. Evans was its treasurer and secretary, and Frederick A. Valentine was its vice-president. Upon the death of Mr. Gibb in 1913 Mr. Evans became president. From the date of the creation of the corporation the former president, Mr. Gibb, as well as Mr. Evans, had private accounts with the corporation in which moneys belonging to and left by them with the corporation were credited to them and against which they were in the habit of regularly drawing checks, in many cases in small amounts, for the payment of their personal obligations, which were debited against them in their respective accounts. These books formed a part of the regular books of account of Mills & Gibb and were kept by its duly authorized bookkeepers, under the direct supervision of Mr. Valentine, who was the head bookkeeper. The salary of Mr. Evans, amounting variously from $35,000 to $45,000 per annum, instead of being paid direct to him, was credited to his account, against which he drew as the occasion required to meet his personal obligations and expenditures.

Indeed, seven different accounts were kept in the name of Mr. Evans affecting his individual ventures or interests, as follows: Cash, private, Terrace Court apartment house, building, One Hundred and Seventy-fifth street lots, Montclair Art Association, individual underwriters. The entries under these accounts indicate numerous items, involving large sums of money belonging to and deposited by Evans from time to time with Mills & Gibb, the receipts of his real estate investments and his other transactions, including the receipts of a sale of pictures belonging to him

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aggregating $150,000. The accounts also contained debits for moneys owing by Evans to the corporation, which in 1916, when the receivers were appointed, indicated a very large net indebtedness to the corporation. The course of dealings between Evans and "Mills & Gibb" establishes a debtor and creditor relationship between them somewhat analogous to that arising between a depositor and bank. It also appears that at the annual meeting of the stockholders of the corporation, held on the 31st day of January, 1912, resolutions were unanimously adopted that all payments and disbursements made since January 25, 1911, appearing on "the books of account and other books of the corporation be, and the same are, hereby approved, ratified and confirmed." Similar resolutions were unanimously adopted at a stockholders' meeting held on the 28th day of January, 1914, for the period commencing January 29, 1913.

The conclusion is irresistible that from the creation of the corporation to the date of the appointment of the receivers the corporation accepted deposits from Evans derived from his outside personal transactions and credited his personal account with moneys which were owing to him by the corporation, against which it issued checks for his personal use, and that the checks thus delivered to and used by him, aggregating hundreds of thousands of dollars, were drawn not surreptitously, but openly and notoriously, with the knowledge and consent of the officers of the corporation. There can be no doubt that the delivery to the defendant of a corporate check for a personal obligation put the defendant upon his inquiry as to the authority of Evans to deliver it, and that as matter of fact no inquiry was made by defendant as to whether the making of the check was authorized by the corporation. But assuming that the defendant had made inquiry of Mr. Gibb, the then chief executive officer of the corporation, or of the vice-president,

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Valentine, it is clear that he would have been advised that the check was issued with the sanction of the corporation. Corporation checks were regularly used in payment of the president's personal accounts, and there can be no question that he was fully aware of the similar practice of the corporation with respect to its payment of the obligations of Evans. Had inquiry been made of Mr. Valentine, the vice-president and head bookkeeper, he could not have done otherwise than state that the issuance of the check was authorized. As there were no officers other than Evans it follows that inquiry would have been bootless. It is wholly immaterial, so far as defendant is concerned, whether the officers and directors conducted the business of the corporation loosely or even contrary to its by-laws.

Defendant's liability may only be measured by the duty cast upon him to make inquiry at the sources obviously available to him for the purpose of ascertaining whether the check was issued with authority, and he is only chargeable with knowledge of all the facts of which he might be apprised upon such inquiry and of all the inferences to be fairly drawn therefrom. *Cohnfeld* v. *Tanenbaum*, 176 N. Y. 126; *Ward* v. *City Trust Co.*, 192 id. 61, 70; *Bischoff* v. *Yorkville Bank*, 218 id. 106; *Ehrlich, Inc.*, v. *Levine*, 83 Misc. Rep. 136. The defendant would have been legally justified in accepting the check had he been apprised by the officers of the corporation that its issuance was authorized by them, for the reason that the transaction was wholly consistent with the idea that the corporation had in its possession moneys belonging to Evans and against which he was entitled to draw by means of checks payable as he directed.

The point made by plaintiffs that the answer of the defendant makes no averment of ratification of Evans' acts by the corporation and that it had no power to ratify an unauthorized act is not relevant to the situa-

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tion here disclosed. This is not a case of ratification, but one where reasonable inquiry of the officers in control of the corporation would have shown that the issuance of the check was known to and authorized by the corporate officers. Indeed, even if there were an affirmative defense of ratification, it seems clear that the resolutions adopted by the stockholders at two successive annual meetings would scarcely amount to a ratification, not only because it appears that all of the stockholders were not present at these meetings, but because it does not appear that the stockholders knew that the books of the corporation contained entries showing the payment by corporation checks of the personal claims of Evans.

As to the plaintiffs' claim that it was *malum prohibitum* under the statutes of New Jersey and of this state for a stock corporation to loan money to a stockholder, it seems to me that it has no application to a transaction like this, where a corporation would clearly be authorized to pay over to a stockholder or to a third party upon his direction moneys in its possession belonging to him and where the only duty cast upon the third party is to make reasonable inquiry to ascertain whether the making of the check was authorized by its officers. This rule is applicable against one who is chargeable with knowledge that funds of a corporation received by him had been misappropriated. In such a case the misappropriation could not be ratified as against the corporation by a majority of the stockholders or as against the rights of the creditors by a vote of all the stockholders. *Moch Co.* v. *Security Bank of New York,* 176 App. Div. 842. In the case at bar no claim is made that the rights of creditors are involved, and there is no proof that the rights of any creditors of the corporation at the time of the making of the check were affected by its issuance. A verdict must be directed for the defendant.

Judgment accordingly.

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AMENDMENT.

Action for personal injuries against city of New York — Repetition of allegations alleging nuisance — Greater New York Charter, § 261; Laws of 1886, *chap.* 572, § 1.— Where, in an action against the city of New York to recover for personal injuries, plaintiff moves to amend the complaint by adding an alleged second cause of action setting forth the same statement of facts as alleged in the first cause of action for negligence, but alleging nuisance, and there is no allegation that defendant created or authorized the conditions stated as the cause of the injuries sustained, or that defendant committed any positive wrong, the motion to amend will be denied upon the ground that if granted it will serve no useful purpose and would ultimately prove futile. It must be assumed that defendant's corporation counsel will interpose as a defense to the proposed second cause of action every statutory bar in its favor, and any proper plea which asserts a statutory prohibition is sufficient for defendant to obtain the benefits provided by either section 261 of the Greater New York Charter or section 1 of chapter 572 of the Laws of 1886, or both. Woentz v. City of New York, 622.

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ASSIGNMENT FOR BENEFIT OF CREDITORS.

Filing of — Creditors' claims — Duties of assignee — Accounting — Laws 1909, *chap.* 17; *Laws* 1914, *chap.* 360, § 15 (7, 8). Where a general assignment for the benefit of creditors was filed in the proper county clerk's office on November 11, 1914, at 1:28 P. M. the filing of a creditor's claim with the attorneys for the assignee in the forenoon of November 11, 1915, is timely. Section 15(7) of chapter 360 of the Laws of 1914, amending the Debtor and Creditor Law (Laws of 1909, chap. 17), and which declares that the court upon the final settlement of an insolvent debtor's estate shall have power to direct the assignee to " pay to the lawful creditors their proportionate dividend notwithstanding their claim has not been presented in accordance with the notice sent out by the assignee, provided one year has not elapsed since the filing of the general assignment," limits the power of the court to exonerate a creditor from the consequences of his failure to present his claim in accordance with such notice, to a period of one year after the filing of the general assignment, and a claim not filed until after the expiration of a full year is lost. The court, however, has the power and it is also its duty to treat formal verified proofs of claim filed by creditors after the expiration of the prescribed time limit as amendments of unverified proofs of claim previously filed. Under section 15(8) of chapter 360 of the Laws of 1914, giving the court power to allow secured creditors " such sum only as to the court seems to be owing over and above the value of their securities," a creditor bank which since the making of a general assignment for the benefit of creditors has realized on collateral security held by it will be allowed a dividend only upon the balance of its claim. Matter of Vietor, 308.

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ATTACHMENT.

1. *Return of marshal as to levy made under warrant of — Executions — Judgments — Appeal — Municipal Court Code*, §§ 129(1), 154. Where the return of a marshal as to the levy, made under the warrant of attachment granted in a Municipal Court action, after stating that he had attached and taken into his custody certain property of defendants, further states that the premises where said property was were locked up and that he was unable to obtain admission, there is no valid levy, and subsequent proceedings for constructive service of the summons taken in attempted compliance with section 83 of the Municipal Court Act, then in force, were void, and the judgment thereafter entered was unauthorized and void. Even had the attachment been duly levied and the judgment valid, an execution against the wages of the defendants was unauthorized because the judgment, by virtue of section 91 of the Municipal Court Act, was not enforcible by execution against any other property of defendants, except only such as was actually levied upon. Under section 154(5) of the Municiapl Court Code an order denying defendants' motion to vacate and set aside the execution issued against their wages and to vacate and set aside the judgment entered against them, is appealable so far as it relates to the judgment, but under section 155 of said Code no appeal lies from an order entered on a motion to vacate an execution separate from an appeal from the judgment. The judgment having been rendered without due service of process, defendants under section 253 of the Municipal Court Act, then in force, might move to open their default and have the case set down for pleading or trial, or, under sections 310 and 311 of said act, take an appeal from the judgment, but the new remedy provided by sections 129(1) and 154 of the Municipal Court Code which do away with the former forms of proceeding and substitute a motion to vacate the judgment and for an appeal from an order granting or denying such motion, was available to defendants whether the judgment was rendered before or after September 1, 1915, when the Municipal Court Code took effect. Davidoff v. Chipornoi, 291.

2. *Warrant of, against nonresidents — Service — Pleading — Affidavits — Code Civ. Pro.* §§ 636, 682 — *Municipal Court Code*, §§ 40, 54.— Where, under a warrant of attachment granted in an action brought in the Municipal Court of the city of New York against nonresident defendants to recover for failure to deliver certain goods according to contract, a certain account due to defendants from a resident debtor was levied upon, and it appears that the only service of the summons and complaint and other papers, of all of which defendants had no notice, was made by delivery thereof to said resident debtor, a judgment entered in favor of plaintiff against defendants, who did not appear, is without due process of law and will be vacated on the ground that it is null and void. The provision of section 54 of the Municipal Court Code and of section 682 of the Code of Civil Procedure, under which a motion to vacate an attachment must be made before the actual application of attached property or the proceeds thereof, presupposes a valid notice to the defendants of the pendency of the proceeding and does not preclude a motion to vacate the attachment promptly upon discovery of its existence. While an allegation of the complaint that plaintiff was ready to receive the goods was sufficient for the purposes of the pleading, it was necessary that the affidavit on which the attachment was granted should state

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ATTACHMENT — Continued.
facts from which the court could determine whether said allegation of the complaint could be substantiated, and the affidavit failing to show facts supporting the allegation of the complaint the warrant of attachment was improperly granted and should be vacated. A statement in the moving affidavit that the defendants were justly indebted to the plaintiff in a certain sum over and above all payments, set-offs or counterclaims which defendants have against the plaintiff, "as near as they are known to deponent," does not comply with section 40 of the Municipal Court Code and section 636 of the Code of Civil Procedure. Nerenberg v. Keith, 551.

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Action for legal services — Trial — Evidence — When motion for compulsory reference granted.— Where, in action by attorneys to recover for legal services some of which were rendered not for the defendant corporation but for individuals connected therewith, there was presented a large number of subjects of employment that had no relation to each other nor apparent connection except the fact that they were rendered by plaintiffs for defendant, and it is probable that it would be impossible for the jury to keep in mind the evidence in regard to each of the many items of the claim and to give that evidence its proper weight and application, a motion for a compulsory reference of the issues will be granted. York v. McKeever Co., 690.

AUTOMOBILES.
Reckless driving on public streets — Misdemeanor — Penal Law, § 1938 — *General Highway Traffic Law of* 1917.— Where the act of defendant in driving an automobile on the public streets of a city at a greater speed than one mile in four minutes was not only in violation of a local ordinance but also violated the provisions of the General Highway Traffic Law (Laws of 1917, chap. 655), which prohibits reckless driving and makes the same a misdemeanor, defendant may be proceeded against under either provision of law, but under section 1938 of the Penal Law it is improper to render two different judgments of conviction against him. People v. Fitzgerald, 695.

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BAILMENT.
Restaurant keepers — Bailor and bailee — Judgments.— The plaintiff visited a restaurant kept by defendants' intestate and handed to her escort her pocketbook which had in it a sum of money and a diamond ring. He put it in his overcoat pocket and checked the coat in the coat room and when later, on request, the coat was returned to him the pocketbook was gone. *Held*, that in the circumstances defendants' intestate did not become the bailee of the pocketbook' was not liable for its loss and that a judgment in favor of plaintiff should be reversed and the complaint dismissed. Robin v. Colaizzi, 298.

BAILOR AND BAILEE.
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1. *Liens — Waiver.*— Where a mechanic's lien creditor of a bankrupt, in its proof of claim filed with the referee in bankruptcy, asserts its right to the lien, there is no waiver thereof. Where such creditor accepted dividends from the bankrupt estate only after the trustee in

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BANKRUPTCY — Continued.
bankruptcy, the creditors' committee and the defendants in an action to foreclose the lien for an unpaid balance due had stipulated in writing that the acceptance of such dividends should be without prejudice to plaintiffs' claim, that their lien filed was a valid one, and to their right to enforce the same for payment of the balance due, there was no waiver of the lien. While in bankruptcy proceedings a secured creditor is not entitled to vote at a creditor's meeting the fact that through the fault or inadvertence of the referee or trustee a creditor is permitted to vote at such meeting when his lien has been asserted in his claim as filed is no waiver of the lien. Horton v. Queens County Machinery Corp., Inc., 31.

2. *Trustee in — Executions — Motions and orders — Trusts — Real Property Law — Bankruptcy Act,* § 47, *clause* 2 (*a*) *as amended — Code Civ. Pro.* § 1391.— The words "other personal property, which can not be reached by execution" in section 98 of the Real Property Law, which provides that "Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property, which can not be reached by execution," define the surplus income of spendthrift trusts, by implication at least, as a kind of personal property that can not be reached by execution. A trustee in bankruptcy being vested under clause 2 of subdivision a of section 47 of the bankruptcy Act, as amended in 1910, with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied, a motion made by a trustee in bankruptcy, within the time allowed by law for the filing of claims against the bankrupt's estate, for an order directing that an execution issue under section 1391 of the Code of Civil Procedure against the income from certain trust funds for the benefit of the bankrupt and directing the testamentary trustee to pay over, etc., will be granted. Matter of Poskanzer, 100.

3. *Adjudication in — Trustee in — Judgments — Foreclosure — Motions and orders — Garnishee order — Injunctions — Sheriffs — Poundage — Code Civ. Pro.* §§ 1391, 3307(23) — *Debtor and Creditor Law,* § 150.— On May 16, 1917, after a deficiency judgment in an action to foreclose a mortgage had been docketed against the defendant, a school teacher employed by the city of New York, a garnishee order issued against her salary under section 1391 of the Code of Civil Procedure was filed with the corporation counsel, and on June 1, 1917, she was adjudged a voluntary bankrupt and the claim against her under the deficiency judgment was duly scheduled. On July 7, 1917, the bankruptcy court ranted an order restraining interference with her salary under the garnishee order. *Held,* that a motion made by her after her discharge in bankruptcy had been granted, August 22, 1917, to vacate the garnishee order should be granted and the city comptroller directed to pay her so much thereof as was withheld since the date of her adjudication as a bankrupt, the amount of salary withheld under the garnishee order from its date to the adjudication in bankruptcy to remain in the hands of said comptroller until the trustee in bankruptcy take such steps as he may be advised, with notice to the sheriff that his right of poundage under section 3307(23) of the Code of Civil Procedure,

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BANKRUPTCY — Continued.
if claimed, may be protected. All proceedings in bankruptcy relate to the time of the bankruptcy adjudication, and a contention that under section 1391 of the Code of Civil Procedure plaintiff was entitled to ten per cent of the bankrupt's salary down to the time that the judgment for deficiency should be canceled pursuant to section 150 of the Debtor and Creditor Law, which provides in substance that at any time after one year has elapsed since the bankrupt was discharged from his debts he may apply to the court in which the judgment for deficiency was rendered against him for an order directing said judgment to be canceled and discharged of record, is untenable, the provisions of the Bankruptcy Act being paramount to the state statutes. Friedman v. Gibbons, 356.

See **Security for Costs.**

BANKS.

1. *Mistake of, in failing to honor depositor's check — Damages — Trial.*— Where a bank through its own mistake fails to honor a depositor's check at a time when he had sufficient funds to meet it, and thereafter he is refused credit by the party from whom he bought goods in payment of which the check was given, he is, in an action against the bank, entitled to have the question of damages sent to the jury. Schein v. Public Bank of New York City, 499.

2. *Impairment of capital — Duties of directors of — Superintendent of banks — Evidence — Actions — Statute of Limitations.*— Where in consequence of a letter from the superintendent of banks, calling attention to the fact that the capital of the defendant bank was impaired and requiring the same to be made good, the board of directors held a meeting, at which the letter was read, and unanimously adopted a resolution that the directors put in enough to make a surplus account exceeding the amount of such impairment, a contribution by plaintiff, one of the directors, to said account constitutes a gift and not a loan, and he is not entitled to recover the same by an action against the bank. The fact that plaintiff subsequently received a receipt signed by the cashier of the bank, who was not shown to have any authority to sign anything more than a mere acknowledgment of the receipt of money, stating that the plaintiff's payment was a loan, is not sufficient to change the character of the transaction, nor could any understanding of the other directors as to their own payments, if competent for any purpose, justify the conclusion that plaintiff's payment was a loan. Where the court, over defendant's objection and exception, admitted in evidence a letter from one of the other directors written after the adoption of said resolution to show that the writer understood the transaction to be a loan, but refused to admit a letter also written after said resolution by the president of the bank in his official capacity to the superintendent of banks, stating that the directors would "donate to the bank the amount (of their payments for surplus) as they originally intended," to which exclusion defendant excepted, the contrary and inconsistent rulings cannot be regarded as harmless. Andrews v. Cosmopolitan Bank, 672.

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BENEFIT SOCIETIES.

Amendment to by-laws as to monthly payments — Controversy as to amount due under benefit certificate. Evans v. Supreme Council of Royal Arcanum, 720.

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BONDS.

Action to recover — Highways — City of New York.— In an action to recover upon bonds given to the city of New York by defendant and her testator, covenanting to reimburse the city for the amount of salary paid to said testator as superintendent of highways of one of the city boroughs for two certain years, which might thereafter accrue or become due to the legally appointed superintendent of highways of said borough, it is incumbent upon the plaintiff, the assignee of the bonds, to show that the city was required to and did pay to him the whole or some part of said salary which it had already paid to defendant's testator for services as superintendent of highways during the years in question, and as the city which during that time never paid the salary to any person other than defendant's testator may not recover on the bonds, the complaint should be dismissed. Collins v. Scannell, 604.

See **Executors and Administrators; Indemnity; Sureties.**

BREACH OF PROMISE.

See **Marriage.**

BROKERS.

Action to recover commissions — Agency — Evidence — Trial — Lease.— In an action to recover brokers' commissions in procuring a subtenant for the lessee of certain premises it appeared that there were several brokers working on said lease, the exclusive agency of plaintiffs was not proved nor was there sufficient evidence on the point to justify the court in leaving the question to the jury, and the testimony as to whether plaintiffs or another was the efficient procuring cause of the lease was conflicting. *Held*, that a charge to the jury that where a broker is employed to find a lessee under an agreement for the exclusion of all other agencies the broker is entitled to his commission when he produces a party ready to make the lease upon satisfactory terms to the owner or lessor, and the principal cannot relieve himself from liability by a capricious refusal to consummate the lease or by a voluntary act of his own disabling him from performance, and a further charge that if the owner employs a broker, with the understanding that the latter's agency shall be exclusive, the owner will subject himself to liability for breach of contract if, notwithstanding, he engages or avails himself of the aid of another broker for the same purpose, were clearly prejudicial to defendant calling for the reversal of a judgment in favor of plaintiffs. That the jury must necessarily have understood that they might find that the plaintiffs had an exclusive agency for the lease of the premises and if so they were entitled to commissions, even though the lease was procured by the efforts of another broker. Harris v. Morton & Co., 398.

CALENDAR.

See **Motions and Orders.**

CARRIERS.

Of passengers — Injunctions — Automobiles — Consent of local authorities — Laws of 1915, *chap.* 667, § 26 — *Public service commission — Transportation Corporations Law*, § 25.— The operation of defendant's auto bus line between the city of Mount Vernon and Rye Beach is in competition with another common carrier, and without the consent of the local authorities of the cities of Mount Vernon and New Rochelle

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CARRIERS — Continued.
as provided by section 26 of chapter 667 of the Laws of 1915, and a certificate of public convenience and necessity from the public service commission as required by section 25 of the Transportation Corporations Law, such operation is unlawful and will be enjoined. Public Service Commission v. Mount Vernon Taxicab Co., 497.

CERTIORARI.
1. *Allegations contained in petitions for writs of — Questions to be determined upon hearing on return to writs — Street railways — Motions to quash writs granted — Code Civ. Pro.* § 2140.— A motion to quash a writ of certiorari may be granted either upon the papers upon which it was granted or upon additional affidavits and either before or after return thereto, and where it appears to have been improvidently granted the motion should prevail. Where the allegations of a petition for a writ of certiorari to review an order of the public service commission for the first district, directing relators to provide additional cars for public use on their several railroads, though substantially based upon the provisions of section 2140 of the Code of Civil Procedure, stating the questions to be determined upon the hearing on the return to the writ, are not supported by any allegations of fact whatsoever, and taken as a whole amount to nothing more than a sworn statement that the commission was wrong in making the order sought to be reviewed, that its action was unjustified, that petitioners are agreed and that they ask an opportunity to review said orders, and it appears that relators have had an opportunity to supplement the bare allegations of their petitions by replying affidavits and have failed so to do, and an examination of all the papers fails to disclose a single fact from which it can be judicially determined that the order of the commission is even *prima facie* unreasonable, unwarranted or unlawful, the court cannot determine that there is reasonable ground to believe that error has been committed, and motions to quash the writs will be granted. People ex rel. Brooklyn Heights R. R. Co. v. Public Service Commission, 10.

2. *Review of order of State Excise Commissioner — Statutes — Injunctions.*— On certiorari to review an order of the state commissioner suspending relator's privileges under his liquor tax certificate procured long before the enactment of said statute and prohibiting him from selling alcoholic beverages then on hand, the state excise commissioner will be enjoined from enforcing such order of suspension pending a decision on the writ. People ex rel. Doscher v. Sisson, 23.

3. *To review special franchise assessments — Street railways — No return allowed on theoretical depreciation fund — Burden of proof — Real property.*— The franchises of the thirteen surface railroads which comprise the New York City Railways system should be considered as one entire system, and for the purposes of special franchise assessments the value should be determined by the net earnings rule. Where on certiorari to review special franchise assessments of said railway system it appears that a certain power plant was discarded because the relator found it more economical to purchase power than to manufacture it, and that at the time of such discarding one-half of the stipulated life of the machinery had expired, an allowance for obsolescence for the remaining one-half should be allowed during the tax year in which the discarding actually occurred, and an allowance for

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CERTIORARI — Continued.
physical depreciation to be determined by the straight line method, and no return should be allowed to relator upon the theoretical depreciation fund. Where it is apparent that the interest on relator's daily bank balance should be included in income, it should be allowed a return on accounts receivable, cash on hand and prepaid insurance, the amount of such items to be determined from the average amount for the whole year, in the absence of proof that relator kept an amount of accounts receivable, cash on hand and prepaid insurance, other than required for the efficient conduct of its business. The relator having shown what moneys and property are actually used in the conduct of its business, the burden is upon defendant to show that such an amount is more than is reasonably required for that purpose. Relator having failed to show that the amount of a so-called city loan was actually used in the conduct of its business and the interest on the loan not having been included by relator in the gross income, no return will be allowed on said loan. There should be excluded from the gross income and from the operating expenses of the entire system the income and expense arising from the operation of cars over the Williamsburg bridge. All the real estate used in the operation of the roads included in relator's system should be included, even though it might be possible to obtain less expensive property for the same purpose. People ex rel. New York Railways v. State Board of Tax Commissioners, 205.

4. *Writ of, to review alleged determination of superintendent of insurance — New York Fire Insurance Exchange — Insurance Law*, § 141.— An application for a writ of certiorari to review an alleged determination of the superintendent of insurance of the state for an order for the removal of an alleged unfair discrimination in fire insurance rates consisting in the fixing by the New York Fire Insurance Exchange of a much lower rate on unmanufactured than on manufactured furs in storage warehouses equipped with sprinklers to extinguish fires and the refusal of that organization to fix in a similar way a lower rate for unmanufactured than for manufactured furs in storage warehouses not so equipped, denied, but without prejudice to a renewal of the application for a hearing at which the New York Fire Insurance Exchange can be heard, the superintendent of insurance basing his refusal to interfere, and to issue the order asked for, upon the language of section 141 of the Insurance Law. Matter of Groh's Sons, 611.

Determination of local commission final — Laws of 1917, chap. 623, § 8. Matter of Hickey, 323.

See **Contracts; Mandamus; Public Service Commissions.**

CITY COURT OF BUFFALO.
See **Injunctions.**

CIVIL RIGHTS LAW.
See **Injunctions.**

CODE OF CIVIL PROCEDURE.
§ 382(1). Matter of Fingar, 516.
§ 636. Nerenberg v. Keith, 551.
§ 682. Nerenberg v. Keith, 551.
§ 768. MacArthur Bros. Co. v. City of New York, 591.

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CODE OF CIVIL PROCEDURE — Continued.
§ 803. Murphy v. Keenan, 443.
§ 829. Matter of Fingar, 516.
§ 984. General Baking Co. v. Daniell, 382.
§ 1335. Boss v. Hutchinson, 1.
§ 1391. Matter of Poskanzer, 100.
§ 1391. Friedman v. Gibbons, 356.
§ 2140. People ex rel. Brooklyn Heights R. R. Co. v. Public Service Commission, 10.
§ 2232. Milligan v. Gabbett, 253.
§ 2265(2). Schutrum v. Buffalo Wholesale Hardware Co., 115.
§ 2458(1). Matter of De Angelli, 606.
§ 2569(6). Matter of Chauncey, 275.
§ 2615. Matter of Hemstreet, 340.
§ 2701. Matter of Mahnken, 175.
§ 3253. Greenberg v. Marsh, 18.
§ 3268(4). Poskanzer v. Bullock, 590.
§ 3307(23). Friedman v. Gibbons, 356.

CONSIDERATION.
See Contracts.

CONSTITUTIONAL LAW.
1. *Unconstitutionality of chapter* 521, *Laws of* 1917 — *Statutes.*— A statute (Laws of 1917, chap. 521) empowering the state excise commissioner, with the approval of the governor whenever in his opinion public safety requires and on the application of the mayor of a city, to suspend privileges under liquor tax certificates during the present war in such parts of the city as are in proximity to camps, barracks or munition factories, and which does not provide for the giving of notice to the parties to be affected and no opportunity to be heard on the question whether the suspension should be ordered, is unconstitutional as a taking of private property without due process of law for a public use without compensation; such statute is also unconstitutional in that it attempts to delegate legislative power. People ex rel. Doscher v. Sisson, 23.

2. *Requirements of safety in factory buildings against fire — Statutes — Actions — Industrial commission — Constitutionality of section* 79-b *of Labor Law.*— Section 79-b of the Labor Law, which establishes the minimum requirements of safety in all factory buildings erected in this state prior to October 1, 1913, for the safeguarding of employees against fire, is a valid exercise of the police power and is constitutional. While in many instances compliance with the statute may entail hardship upon the owners of factory buildings which at the time of their erection fully complied with all existing provisions of law, that does not mean confiscation, and, unless it results from an unreasonable exercise of arbitrary power on the part of the legislature, no degree of hardship can justify the court in nullifying the statute, since it is the primary duty of the legislature to protect the common interests of the whole people even at the expense of personal or local interests. The mere fact that the statute cannot be enforced without causing expense to the citizen who comes within its provisions furnishes no constitutional obstacle to its enforcement. Cockcroft v. Mitchell, 211.

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CONSTITUTIONAL LAW — Continued.

3. *Mandamus — Statutes — Unconstitutionality of — Optional City Government Law — Election of city officers.* — Where the duty to perform an act depends solely on whether a statute is unconstitutional and void, the question may be determined on a petition for a writ of mandamus. The curative statute (Laws of 1916, chap. 530) by which the legislature undertook to repeal chapter 300 of the Laws of 1904, as amended (charter of the city of Niagara Falls prior to the adoption of plan C of the Optional City Government Law, enacted by Laws of 1914, chap. 444) and to grant a new charter to said city and validate the election of the mayor and four councilmen who had been selected pursuant to the Optional City Government Law which had been declared unconstitutional, is unconstitutional and void, and chapter 300 of the Laws of 1904 is still the charter of said city, and under the provisions thereof there are to be elected at the general election to be held in said city on November 6, 1917, certain city officers. People ex rel. Ferguson v. Vroman, 233.

4. *Service of process — Nonresidents — Attachment — Municipal Court Code, § 48.* — Section 48 of the Municipal Court Code relating to the service of the summons and complaint and other papers in an attachment suit immediately upon the making of the inventory, in so far as it does not provide for notice to the defendant but permits judgment to be entered against a nonresident upon the mere service of process upon the person in whose possession the property attached is found, violates the "due process" clause of the Constitution of the United States and of the Constitution of the state of New York. Nerenberg v. Keith, 551.

5. *Statutes — Schools — Jurisdiction — Education Law — Town school boards — United States Constitution, Fourteenth Amendment — New York Constitution, art. IX, § 1; art. X, § 2.* — Under the constitutional provision (State Const. art. IX, § 1) that the legislature shall provide "for the maintenance and support of a system of free common schools, wherein all children of this State may be educated" the legislature has power to provide such a system or systems as will meet the needs of each locality, and its classification is not subject to judicial review; but it is not required to provide the same system or organization for each locality in the state. The statute (Education Law, art. XI-A, §§ 330-365, added by chapter 328 of the Laws of 1917), the purpose of which is to reorganize the rural school districts into a town school system and provide for the creation of a town board of education in each town, with certain exceptions, and similar boards in certain union free school districts, the qualification of members of such boards, appointment of officers, their powers and duties, etc., is constitutional and valid. Section 331 of the Education Law, which establishes a town board of education in each town of the state, having jurisdiction over all the schools of the town as thereinafter provided, "except in union free school districts having a population of fifteen hundred or more or employing fifteen teachers or more at the time this act takes effect, and the school districts in the several towns of a county which adjoins a city having a population of one million or more and in which there are only two district superintendents," does not violate the Fourteenth Amendment of the United States Constitution in that it unlawfully discriminates against the citizens of Westchester county and denies to them the equal protection of the

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CONSTITUTIONAL LAW — Continued.
laws, because the exception can only apply to and affect Nassau county. The provision of section 352 of the Education Law for an apportionment and distribution, by the old trustees of the school districts subject to the statute, of the funds remaining in their hands after closing the financial affairs of the districts, except state moneys, among the taxpayers of the district, violates no constitutional provision, such transfer being simply from one public authority to another for convenience of administration. The provision of section 353 of the Education Law which makes the bonded indebtedness of the several school districts affected a charge against property subject to tax for the maintenance of the schools of the town, and provides for an appraisal of school property, a credit to each district of its value after deducting the bonded indebtedness and an apportionment and distribution of the amount credited to and among the owners or possessors of taxable property in the district in the ratio of their several assessments, does not violate any constitutional inhibition, the purpose of the statute being merely to equalize the burden of the new school system upon all the taxpayers of the town. The word "election" in section 354 of the Education Law, as well as the method prescribed for such election, is not an "election" within the meaning of section 2 of article X of the State Constitution which provides the method by which certain county, city, town and village officers shall be selected, etc., but is simply the equivalent of an appointment by the boards of education of the town jointly assembled for that purpose and said section 354 will not be held unconstitutional merely because the legislature made use of the word "election" for what is plainly nothing but an appointment within the meaning of the Constitution. Brown v. Bunselmeyer, 625.

See **Jurisdiction; Public Service Commissions.**

CONTRACTS.

1. *To compensate for personal services — Consideration — Evidence.*— A contract to compensate another for personal services rendered to the promisor, since deceased, should not only be certain and definite and founded upon an adequate consideration but should be in writing, or if based on oral testimony it should be given or corroborated in all substantial particulars by disinterested witnesses. Cross v. Hoy, 75.

2. *Awarding of, for legislative printing — State printing board — Certiorari.* — The act of an administrative or ministerial officer does not become judicial simply because it is necessary to use discretion and judgment in its performance. It becomes judicial only where there is an opportunity to be heard and a decision made upon consideration of the evidence presented. In the matter of awarding a contract for legislative printing some of the acts of the state printing board in investigating and tabulating the bids, of investigating the financial responsibility of the bidder and its ability to perform the contract and of determining the letting, are certainly matters involving the exercise of judgment and discretion, yet where the action of the board in awarding the contract is not accompanied by any of the forms of judicial action, its determination is not reviewable on certiorari. People ex rel. Argus Co. v. Hugo, 481.

3. *Written — Interpretation.*— A written contract is to be interpreted in the sense in which the promisor had reason to suppose it

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CONTRACTS — Continued.
was understood by the promisee. Wolf v. United States Casualty Co., 541.

4. *Execution of — Provisions of — For sale of real property — Deeds — Liens.*— By a written contract for the sale of certain real property, plaintiff, the intending purchaser, agreed to pay the purchase price, $2,000, as follows: $100 in cash to the parties of the first part or the survivor of them and $15 on the first day of each and every month during their lives and at their death continue said payment to their heirs until the principal sum had been paid in full; and it was mutually agreed that at the death of the parties of the first part plaintiff should have the privilege of paying off at once the balance then due upon the purchase price. The contract also provided that, in consideration of the privilege to the parties of the first part of occupying a certain part of the premises rent free during their lifetime, no interest should be charged on the unpaid balance of the purchase price. Synchronously with the execution of the contract the parties of the first part thereto executed and delivered to plaintiff a full covenant deed of said premises which contained a clause to the effect that the premises conveyed were free from incumbrances excepting certain conditions and obligations contained in the contract of sale between the parties to the deed of conveyance, both of which instruments were duly recorded in the proper county clerk's office. One of the parties of the first part to the contract of sale died within a year of the execution thereof and the other party died about seven years later. The cash payment was made and the payments of $15 per month were duly made until the death of the survivor of said parties of the first part when there remained unpaid on the purchase price the sum of $535, which amount, in an action to have the contract of sale canceled and discharged of record as a lien and incumbrance on the premises in question, plaintiff offered to pay into court. *Held*, that the contract of sale constituted a vendor's lien for the purchase price and was recorded for the purpose of giving notice thereof; that it was an incumbrance on plaintiff's title and upon full payment of the purchase price it should be canceled and discharged of record. That in the provision of the contract that at the death of the parties of the first part the monthly payments should be paid to their heirs until the principal sum had been paid in full the word "heirs" should not be given its strict legal definition and that the balance due upon the purchase price at the death of the parties of the first part to the contract should be divided between their next of kin at the time of the death of the survivor of said first parties. Crump v. Mangan, 568.

See **Mechanics' Liens; Specific Performance; Telephone Companies.**

CONTRIBUTORY NEGLIGENCE.
See **Negligence.**

CORPORATIONS.
Receivers — Jurisdiction — Pleading — Accounting — Actions — General Corporation Law, § 35.— Under section 35 of the General Corporation Law the title to the assets of a corporation upon its dissolution vests in the directors as trustees for the creditors and stockholders unless other persons shall be appointed by the legislature, or by some court of competent jurisdiction. Where no directors are to be found, the duty to collect and administer the assets of such a corporation

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CORPORATIONS — Continued.
devolves upon a receiver to be appointed, but no cause of action to reach assets in the hands of a third party vests in the stockholders. A complaint by the stockholders of a corporation for an accounting by defendant of property of the corporation, of which he was not a director, which came into his hands after its dissolution by expiration of its charter, alleging that defendant received said property from two directors now deceased who were in possession at the time of said dissolution, with full knowledge that it represented corporate assets, and, further, that there are no creditors of the corporation and that the directors took no steps toward the settlement of its affairs and the division of its assets, and there are no allegations to support the case as one prosecuted in behalf of the corporation or of a receiver in its behalf, is subject to demurrer upon the ground that it is insufficient in substance, and also upon the further ground that there is a defect of parties defendant, there being none before the court who may assert legal title to the property in suit. The question whether there are debts of the corporation to be paid cannot be determined as an issue between the stockholders and the defendant in the present action, as, until the statutory requirements for the ascertainment of the claims of creditors are met, there can be no administration of the assets upon the theory that the stockholders are entitled to the property. Therefore, the allegation that there are no creditors of the corporation, admitted by the demurrer to the complaint, cannot aid the plaintiffs. The cause of action resides in a receiver who must first be appointed to assert and to protect the rights of all persons, whether creditors or stockholders, who may have an interest in the distribution of the property when recovered from the defendant. De Martini v. McCaldin, 304.

COSTS.
See **Mechanics' Liens; Security for Costs.**

COUNTERCLAIMS.
Pleading — Carriers — Damages — Interstate Commerce Act.— In an action against a shipper to recover freight charges on an interstate shipment, the defendant may counterclaim for damages to the goods growing out of the shipment though under the Interstate Commerce Act freight charges cannot be paid except in currency. Pennsylvania R. R. Co. v. Bellinger, 105.

CRIMINAL LAW.
See **Indictment; Money Had and Received.**

DAMAGES.
Measure of — Judgments — Replevin.— Where the defendant delays by appeal the satisfaction of a judgment in an action to recover personal property, the plaintiff is entitled to damages for the delay to be measured by the interest on the value of the property sought to be replevied as fixed on the trial whether the value is paid or the property restored. Crocker-Wheeler Co. v. Genesee Recreation Co., 440.

See **Banks; Counterclaim; False Imprisonment.**

DEBTOR AND CREDITOR LAW.
See **Bankruptcy.**

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DECEDENTS' ESTATES.

1. *Executors and administrators — Application for order granting leave to enter into possession of real property denied — Motions and orders — Code Civ. Pro.* § 2701.— An *ex parte* application, under section 2701 of the Code of Civil Procedure, for an order granting an administratrix leave to enter into possession of real property of which decedent died seized, denied upon the ground that the petition did not state facts to justify the granting of the order. Where facts are such as to justify an application under said section, the relief asked for cannot be granted without the issuance of a citation. Matter of Mahnken, 175.

2. *Negotiable instruments — Gifts — Wills — Insurance (life).* — Where it is clear that a promissory note given without a valuable or sufficient consideration was intended by the maker to operate at his death as a gift to the payee, his daughter, of the sum of money therein mentioned, the note is not a valid obligation against his estate, nor does it amount to or effect a valid gift of money. Where, however, a provision of the maker's will mentions the note and directs that the proceeds of certain insurance be paid thereon, to the extent of the sum realized upon the insurance policies, the payee is entitled to recover as legatee such amount over and beyond such other provisions as are made for her by the will. Matter of Wiles, 701.

DEEDS.

See **Contracts.**

DEFAULT.

See **Sureties.**

DEPOSITIONS.

Examination before trial — Witness — Motions and orders — Municipal Court Code, § 27(4).— Section 27 (4) of the Municipal Court Code does not authorize an order for the examination of defendant's attorney as a witness before trial and an order denying a motion to vacate such an order will be reversed, the motion granted and the order vacated. Hopkins v. Blosveren, 500.

DEVISE.

See **Wills.**

DISCOVERY.

Inspection — When application for disclosure of books, papers and documents granted — Actions — Pleading — Evidence — Code Civ. Pro. § 803.— Under section 803 of the Code of Civil Procedure and rule 14 of the General Rules of Practice a disclosure of books, papers and documents relating to the merits or defense of an action may be had to frame a pleading or to enable a party to prepare for trial where the evidence is competent, relevant, material nad necessary. The cases in which such disclosure will be granted group themselves into three classes: Where the books, papers and documents are the foundation of the action; where the applicant has a special interest in the evidence and where the books, papers or documents, in which he has no special interest, contain evidence which the party desires to enable him to prepare his pleading or to prepare for trial. The application, however, in any case will be granted only in the exercise of a sound discretion in the ascertainment of truth and the advancement of justice, but it must appear that the evidence is competent, relevant

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DISCOVERY — Continued.
and material to the issues, unknown to the party seeking it and in the possession of the adverse party. Such an application will be granted even in an equitable action for an accounting between the trustee of a corporation voluntarily dissolved and the executrix of a deceased trustee where the existence of the confidential relationship which is the basis of the accounting is admitted in the pleading. Murphy v. Keenan, 443.

DIVORCE.
Action for absolute — Domicile — Evidence — Judgments.— Within two years after his marriage to plaintiff in this state, defendant without justification left her and their child and went to another state where in less than two years he obtained a decree of divorce on the ground of her cruelty. Though she was served with process in this state she never entered an appearance in the action and at no time lived in the state where the decree was granted. *Held*, that she was entitled to a decree of absolute divorce on the ground of defendant's misconduct with one whom, after the divorce granted to him, he married in another state, a further marriage ceremony between them being celebrated in this state a few days later. Rontey v. Rontey, 166.

DOMESTIC RELATIONS LAW.
See **Habeas Corpus.**

DOMICILE.
Intention to abandon — Wills — Evidence — Transfer tax.— The evidence in a transfer tax proceeding upon the issue as to the last domicile of a decedent who in his last will and in a codicil thereto described himself as "of the city of New York temporarily sojourning in Paris" where he had a home, but who died at sea on his way to New York, considered, and *held*, not to show intention to abandon New York and acquire France as his domicile, and that he was at the time of his death a resident of the state of New York. Matter of Blumenthal, 83.

See **Divorce; Transfer Tax.**

DOWER.
See **Wills.**

EDUCATION LAW.
See **Constitutional Law.**

EJECTMENT.
Action of — Perfecting title under tax sale — Deeds — Evidence — Taxes — Tax Law, § 132.— Where in an action of ejectment the dispute relates only to a particular portion of the property described in the complaint, to which defendant claims title through a state tax sale held in 1895 at which time the property was sold to the people of the state, and it appears that thereafter it was conveyed to one who in turn deeded it to another of whom the defendant was the sole heir, and the uncontradicted proof shows that in the month of December in the years 1896 and 1897 the property was occupied by several persons, but that the statutory notice to redeem within six months was served only on one of them, the title under the tax sale was not perfected and the limitation in section 132 of the Tax Law does not apply. The comptroller's deed of lands sold for unpaid taxes is not conclusive as to the service of all notices required to be given relating to the sale of

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EJECTMENT — Continued.
such lands, nor is his certificate conclusive as to the service of the statutory notice to redeem upon the occupant of said lands. City of New York v. Nunez, 375.

ELECTION LAW.
1. § 52 — *Power of court to determine eligibility of candidate for member of assembly — Resignation of candidate from city office too late — Duties of board of elections — Sunday.*— In a proceeding to determine the duties of the board of elections under the Election Law, the court has power to determine the eligibility of a candidate for member of assembly. The hundredth day previous to the general election to be held November 6, 1917, being Sunday, the resignation on the following day of a candidate for member of assembly from a city office is too late, and it is the duty of the board of elections of the county, under section 52 of the Election Law, to recognize the substitute petition designating another for the office of member of assembly. Matter of Bewley, 248.

2. § 88 — *Provision in case of contested nomination for office — Primary elections — Right to examine ballots.*— The provision of section 88 of the Election Law that in the case of a contested nomination for office "any candidate shall be entitled as of right to an examination in person or by authorized agents of any primary ballots upon which his name lawfully appeared as that of a candidate" leaves nothing to the discretion of the court, and upon the claim of one who was a candidate for office at a primary election, that a recount would show that a majority of the votes were cast for him for justice of the Supreme Court in Manhattan and The Bronx, he is entitled as of right to such examination and the ballots are required to be preserved for thirty days for that purpose, and an application made before the expiration of the time limit must be granted. Matter of Rush, 319.

3. *Provisions of, as to registration of students at seminaries maintained by Franciscan order — When name stricken from registry list.*— A student at the seminary of learning known as "St. Anthony's-on-the-Hudson," maintained by the Franciscan order, who abandons his Christian name by which he was formerly known and takes a new name as a member of said order and receives instruction as a candidate for the Roman Catholic priesthood, is not entitled to register in the election district in which the seminary is located and his name should be stricken from the registry list. Matter of Gardiner, 414.

4. *Amendment of section* 513 — *Board of elections — Statutes — Disposition by secretary of state of official war ballots — Laws* 1917, *chap.* 815, § 5. The statute (Laws of 1917, chap. 815, § 5), amending section 513 of the Election Law with respect to the disposition by the secretary of state of the official war ballots in his custody which have been voted in the recent election by the soldiers and sailors in the United States service in the present war, being silent as to when the secretary shall transmit said ballots to the boards of elections, leaves him with a wide discretion as to when he shall make such transmission, provided he transmit the ballots in time to have them properly canvassed. Matter of Boyle, 637.

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ELECTION LAW — Continued.
5. Section 56 — Action of inspectors of election in counting as valid certain marked ballots — Ballots so marked held invalid by Court of Appeals. Matter of Brooks, 715.

ELECTIONS.
Of city officers in city of Niagara Falls — Duties of board of election commissioners — Election Law.— Candidates for the city offices provided for by chapter 300 of the Laws of 1904, as amended, may now be nominated by independent certificates pursuant to the provisions of the Election Law on or before October 17, 1917, and the board of election commissioners is required to do all acts necessary to have the names of the candidates so nominated submitted to the electors at the general election to be held. People ex rel. Ferguson v. Vrooman, 233.

See **Constitutional Law; Election Law.**

EQUITY.
1. *Power of, to relieve — Mortgages — Default — Election.*— Equity has power to relieve a mortgagor from the operation of a clause in the mortgage giving the mortgagee the right to elect that the whole amount of principal and interest shall be due and payable in case of default in payment of interest. Strange v. Rosenberg, 618.

2. Action to compel removal of substantial structure encroaching about twelve feet on plaintiff's land — Ejectment not adequate relief — Damages — Rental value of land considered as vacant property. Belotti v. Bickhardt, 707.

ESTOPPEL.
See **Referees.**

EVIDENCE.
1. *Considered in action by superintendent of banks to enforce statutory liability of stockholders — Pleading — Dismissal of complaint — Banks.* — The evidence in an action brought by the superintendent of banks to enforce the statutory liability of the stockholders of the "Carnegie Trust Company" in liquidation, considered, and the complaint dismissed on the merits as to certain of the defendants and judgment directed in favor of plaintiff against the other defendants. Richards v. Schwab, 128.

2. *Documentary — Witness — Code of Civil Procedure,* § 829.— Items of disbursements made by claimant properly proven by testimony, free from objection under section 829 of the Code of Civil Procedure and properly corroborated by disinterested witnesses or by documentary evidence, allowed. Matter of Fingar, 516.

See **Contracts; Discovery; Divorce; Indictment; Liquor Tax Law; Money Had and Received; Negligence; Partition; Specific Performance; Survivorship; Trial; Wills.**

EXAMINATION BEFORE TRIAL.
See **Depositions.**

EXECUTIONS.
See **Bankruptcy.**

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EXECUTORS AND ADMINISTRATORS.

1. *When executor not compelled to file bond — Accounting — Bonds — Code Civ. Pro.* § 2569(6).— An executor to whom letters testamentary have been issued may not be compelled to file a bond; if thereafter his circumstances do not afford the legatees and creditors adequate security their remedy is by an application under section 2569(6) of the Code of Civil Procedure for the removal of the executor. The failure of an executor to appear before the referee to whom his accounts have been referred and testify in regard to the objections filed thereto is not a ground for his removal, the burden of sustaining the objections being upon the objectors. An allegation in a petition to compel an executor to file a bond, or in the alternative to revoke his letters testamentary, that petitioners were unable in the proceeding to effect personal service of the citation upon the executor is insufficient to warrant the court in removing him. It is not sufficient that the petition alleges in the words of the statute that the executor's circumstances are such as not to afford adequate security to the creditors and legatees interested in the administration of the estate, but facts must be alleged from which the court may conclude that the financial condition of the executor does not afford such security. Matter of Chauncey, 275.

2. *Judicial settlement of accounts of public administrator — Alien enemies.*— Upon the judicial settlement of the accounts of a public administrator, it will be decreed that payments due to subjects of Germany or any of its allies from the funds to be distributed shall be made either at the end of the war to the alien himself, or, in the meantime, to the duly constituted authority of the United States entitled to receive the same. Matter of Kelly, 495.

3. *Judicial settlement of accounts of — Trustees — Wills — Devise — Life estates.*— Where a testator devised to each of his three children a life estate in one of three farms together with the use and income of a certain sum of money "with which to maintain and care for said farm and its belongings," no trust being created in respect to the use of said money, the object of the testator seemingly to be to enable the life tenants to discharge their legal duty to the remaindermen by proper care of the properties devised, and said money bequests are not made conditional upon the use to which they should be applied, the life tenants are entitled to have the *corpus* of said money bequests paid over to them upon the judicial settlement of the account of the executors and trustees upon severally filing a bond. Matter of Weatherbee, 522.

See **Decedents' Estates; Statute of Limitations.**

FALSE IMPRISONMENT.

Allegations of complaint in action for — Trial — Jury — Damages — Pleading — Executions — Malice.— In an action for false imprisonment it is not necessary to show want of probable cause or malice in the sense of ill-will or even recklessness. In such an action, the jury may consider the quality of the act and the intent with which it was done and, if it is found that there was ill-will or recklessness involved, to award punitive damages, and it is only to meet the claim for such damages that mitigating circumstances may be shown. The complaint in an action for false imprisonment alleged substantially that the defendant wantonly and recklessly caused an execution against the

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FALSE IMPRISONMENT — Continued.
person of the plaintiff to be issued without lawful authority and in violation of the laws of the state of New York and of the United States and in violation of the rights and the liberties of the plaintiff, by which he suffered great indignities and was in prison in a certain designated county jail. As a partial defense and in mitigation of damages the answer alleged that defendant was of the opinion that the execution mentioned in the complaint and growing out of a judgment recovered by him against plaintiff in a certain action in which plaintiff herein was plaintiff and defendant herein and others were defendants was a proper process to be issued and delivered to the sheriff in actions of the kind and character upon which said execution was issued; that it was issued by defendant herein without any malice and in the orderly course of his business; and it was further alleged in and by said partial defense that any act or deed of defendant in connection with the issuance of the execution referred to in the complaint did not cause plaintiff herein any damages whatsoever or affect in any way his character or standing in the community in which he resided. The character of the previous action was not stated and there was no allegation showing the reason for the alleged opinion of defendant. *Held*, that a demurrer to said partial defense will be sustained. Jones v. Pickard, 117.

FEES.
See **Reference.**

FIXTURES.
Action to set aside sale of — Personal Property Law, § 44.— Section 44 of the Personal Property Law, declaring that a transfer of an entire stock of goods in bulk without the previous notice which the section requires, will be presumed to be fraudulent and void as against the creditors of the seller, has no application to a sale of fixtures only. Heilmann v. Powelson, 230.

FORECLOSURE.
1. *Of mortgages — Actions — Receivers — Judgments.*— Where the grantee of land subject to a mortgage gives a second mortgage thereon the land is the primary fund for the payment of the first mortgage, though the grantee did not covenant to pay the same, and, upon foreclosure of the first mortgage, rents in the hands of the receiver who was also the receiver appointed in an action to foreclose the second mortgage should be applied on the judgment for deficiency entered in the action to foreclose the first mortgage. Cook v. Kane, 97.

2. *Of purchase money mortgage — Default in payment of interest — Evidence — Judgments — Election.*— Where, in an action to foreclose a purchase money mortgage which provided that in case of default in the payment of interest for ten days the mortgagee might elect to declare the whole principal due, it is apparent from the evidence that the default in the payment of the first interest, for failure to pay which the action was brought, was not occasioned by the wilful neglect of defendants, judgment will be directed relieving them from the consequences of their default upon payment of all arrearages of interest, with interest thereon, within five days after entry of judgment. Strange v. Rosenburg, 618.

See **Mechanics' Liens; Mortgages.**

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GENERAL BUSINESS LAW.
See Penalties.

GENERAL HIGHWAY TRAFFIC LAW.
See Automobiles.

GENERAL RULES OF PRACTICE.
See Motions and Orders.

GIFTS.
See Wills.

GRAND JURY.
See Indictment.

GREATER NEW YORK CHARTER.

§ 1543 — *Power of board of education to make ratable deductions from salaries of teachers in city schools — Schools — Actions.*— Under section 1543 of the Greater New York Charter the board of education of the city of New York has power to make ratable deductions from the salaries of teachers in the city schools on account of absence from duty without leave, and section 65(3) of the by-laws of said board provides that " one twenty-fifth of a month's salary shall be deducted for every day of absence on the part of a * * * teacher unless such * * * teacher is excused for adequate cause, in accordance with these by-laws; but the aggregate deductions in any one month shall not exceed the salary for that month." *Held*, that where plaintiff's assignor, a teacher in one of said schools at a salary of $1,200 per annum, was absent without leave for eleven actual days included in the period from October 15 to October 29, 1915, inclusive, a deduction of $44 from her salary for said month was a " ratable deduction " and no action will lie to recover the amount so deducted. The said board of education acted within its powers when it provided that if a teacher absent herself from service on the days when she is or may be required to work she should not be compensated for the days on which she is expected to rest from that work. Glucksman v. Board of Education, 682.

See Amendment; Mandamus.

GUARDIANS.

Application for appointment of — Infants — Evidence — Paramount right of appointment.— Upon a contested application for the appointment of a guardian of the persons of three infants, respectively, it appeared that the mother of the infants was dead and at the time of her death was not living with her husband, who survived. She and two of her children resided with her sister and the latter's husband and the other child was in the care of and resided with the petitioner, her grandmother. The evidence considered and, *held* (1) that the father has the paramount right to be the guardian of his own children; that this natural right should not be denied him unless it clearly and unequivocally appears that the best interests of the infant demand the appointment of some one else; that in the last analysis the court must be governed by a consideration of what is for the best interests of the children; that it does not appear that the best interests of two of the infants demand that the father should be deprived of his right to the guardianship of their persons, and that the court has authority to appoint some one other than the party for whose appointment the petition prays; (2) that the appointment of guardians may be coupled

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GUARDIANS — Continued.
with conditions; that the appointment of the respondent as guardian of the persons of the two younger infants is upon the condition that the uncle, aunt and grandmother have access to them at all reasonable times and that the respondent see to it that the children named visit them at least once in each month; (3) that the best interests of the third infant demand that the grandmother be appointed the guardian of her person upon condition that the grandmother permit the father to see her and converse with her at all reasonable times and that she have the child visit her father at least once in each fortnight. Matter of Munn, 171.

See Jurisdiction.

HABEAS CORPUS.
When writ of, dismissed — Parent and child — Adoption — Domestic Relations Law, § 70.— Under section 70 of the Domestic Relations Law a habeas corpus proceeding will not lie by the mother of children legally adopted for permission to see them, and the writ will be dismissed and the children remanded to the custody of their foster parent without prejudice to any proceeding which the mother may bring on the equity side of the court for the relief sought. Matter of McDevitt, 588.

HIGHWAY LAW.
See Mandamus.

HIGHWAYS.
See Bonds; Office and Officer.

INDEMNITY.
Action on bond given to save harmless plaintiff in replevin on its bond — Substitution of obligors in contract of indemnity — Effect of seal — Judgment for plaintiff reversed.— The evidence in an action brought upon an indemnity agreement under seal to save the plaintiff in an action in replevin harmless from loss on its bond given to the defendant in said action two years before the making of the agreement in suit, considered, and *held*, that a judgment in favor of plaintiff must be reversed on the ground that there was no evidence of any consideration for the defendant's agreement though the one on whose behalf the action in replevin was brought testified that he told said defendant that the plaintiff in replevin wanted him to sign the indemnity agreement in order to relieve the original obligor from liability, there being no evidence that the plaintiff in replevin ever authorized any such statement to be made or ever released the original obligor from the indemnity agreement. That as there was no evidence that defendant herein had authorized any one to seal the indemnity agreement it did not import a consideration and that the plaintiff herein could not treat the seal as surplusage for the purpose of asserting the validity of the contract and at the same time insist upon it as importing a consideration. Royal Indemnity Co. v. Danziger, 505.

INDICTMENT.
1. *Action to dismiss, denied — Grand jury — Larceny — Evidence — Motions and orders.*— Where by an indictment drawn in the usual common law form defendant was charged in the first count with the crime of grand larceny in the first degree in having stolen from a corporation of which he was sales manager certain blue prints worth

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INDICTMENT — Continued.
more than $500, and the grand jury was warranted by the evidence before it in finding that defendant when he received said prints from the company's service engineer, who had the care and custody of them, intended to appropriate them to his own use, the count is good as charging larceny at common law, and a motion to dismiss the indictment will be denied. The second count of the indictment charging defendant with criminally receiving stolen property, first degree, in that he did feloniously buy, receive and have the same blue prints then and there well knowing them to have been feloniously stolen, dismissed as not supported by the evidence before the grand jury. People v. Brenneauer, 156.

2. *When motion to dismiss, denied — Evidence — Motions and orders — Divorce — Depositions — Criminal law.*— Where, upon a motion made after the inspection of the grand jury minutes to dismiss an indictment charging that defendant conspired with certain persons, naming them, to prevent the due course of law and justice and to give and cause to be given false testimony in a divorce action then pending in the courts of a sister state, and the indictment sets forth certain overt acts alleged to have been committed to effect the object of the conspiracy, and the evidence though failing to disclose concerted action between all the parties named does show concerted action between defendant and one or more of the other parties, the motion will be denied. The act of one of said persons in making a false deposition before a commissioner appointed by the court in which the divorce action was pending not being the ultimate object of the conspiracy, there was no merger thereof in the felony committed by the one making the false deposition. People v. Rose, 650.

See **Liquor Tax Law.**

INFANTS.
See **Guardians; Partition; Surrogate's Court.**

INJUNCTIONS.
1. *Who entitled to — Restraining use of moving picture films — Civil Rights Law*, §§ 50, 51. The use by defendant of plaintiff's name and picture without her consent for display in a moving picture film purporting to represent an occurrence in which she had taken a part and by which defendant is seeking to make money out of plaintiff's reputation and prominence is contrary to the provisions of sections 50 and 51 of the Civil Rights Law and she is entitled to an injunction *pendente lite* restraining such use of her name and picture. Humiston v. Universal Film Mfg. Co., 3.

2. *To stay execution of warrant pending appeal — Landlord and tenant — Summary proceedings — City Court Act of Buffalo — Code Civ. Pro.* § 2265(2).— The City Court Act of Buffalo (Laws of 1909, chap. 570, as amended) providing a comprehensive plan for stays of execution of orders and judgments appealed from of all kinds, a motion under section 2265(2) of the Code of Civil Procedure, for an injunction to stay the execution of the warrant pending an appeal from a final order of the City Court of Buffalo in a summary proceeding to dispossess plaintiffs as tenants holding over after the expiration of the term, will be denied. Schutrum v. Buffalo Wholesale Hardware Co., 115.

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INJUNCTIONS — Continued.

3. *When denied — Columbia University — Resistance to draft ordained by lawful authority.*— Where a student at Columbia University in the course of a public address in which he counseled resistance to the draft ordained by lawful authority, said "We have no love for the kaiser; but as much as we hate the German kaiser we hate still more the American kaiser," and, further, that there had been draft riots in the Civil War but there would be a draft revolution during the war of 1917, and a report of the meeting at which the address was made appeared in the public press the next day, a motion for an injunction *pendente lite* in an action to procure a decree requiring the university to allow him to continue in the institution as a student after notice that he would not be permitted to receive any further instruction therein will be denied. Samson v. Trustees of Columbia University, 146.

See Carriers; Certiorari.

INSPECTION.

See Discovery.

INSURANCE (ACCIDENT).

Policy of — Contracts — Debenture certificate — Judgments — Actions.— In an action to recover one-half of the premiums paid by plaintiff to defendant during a period of twenty years upon a policy of accident insurance, attached to which was a debenture certificate entitling plaintiff to certain benefits, with coupons annexed, the contention of plaintiff that the policy and the certificate must be construed to mean that the privilege of collecting one-half of the gross premiums was earned by the insured if and when he had paid his annual premium for any immediately preceding continuous period of twenty years without collecting any loss, upheld, and a judgment in favor of the plaintiff affirmed, it being clear that the purpose of the defendant in issuing the debenture certificate was to permanently attach to itself any person who took a first policy by offering to him a substantial inducement to renew it for at least twenty years. Wolf v. United States Casualty Co., 541.

INSURANCE (INDEMNITY).

1. *Provisions of policy of — Negligence — Damages — Automobiles —Actions.*— Where by the terms of a policy, by which defendant agreed to indemnify plaintiff up to a certain fixed amount against accidents occurring in relation to the operation of his automobile, and in the event of a suit against him to defend the same, defendant is under no duty to settle a claim, and where during the life of the policy the plaintiff, in an action for damages brought by one injured through the operation of his automobile, settles the claim in an amount a part of which defendant refused to pay, it is not liable to plaintiff for the amount which he contributed to the settlement of the claim in excess of that paid by defendant. Levin v. New England Casualty Co., 402.

2. *Policy of — Automobiles — Criminal law — Actions — Negligence.* — In an action upon a policy by which the defendant agreed to indemnify plaintiff against loss by reason of use of his automobile there can be no recovery of the amount of a judgment recovered against the plaintiff, in an action for personal injuries caused by the operation of the automobile where it is proved on the trial, as pleaded in the answer, that the accident was caused through the commission of a misdemeanor

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INSURANCE (INDEMNITY) — Continued.
by the driver of the automobile, who was under eighteen years at the time, and that such criminal act was participated in by the plaintiff as principal because he authorized and commanded such use of the automobile by the driver knowing his age. Messersmith v. American Fidelity Co., 598.

INSURANCE (LIFE).
See **Survivorship.**

INTESTACY.
See **Wills.**

JUDGMENTS.
1. *Motion for judgment on the pleadings granted — Motions and orders — Banks — Code Civ. Pro.* § 2446.— A judgment debtor's bank account can only be reached, after the return of an execution unsatisfied, by an action in equity or by proceedings supplementary to an execution, in accordance with section 2446 of the Code of Civil Procedure, which provides that a person indebted to a judgment debtor may be permitted by order to pay to the sheriff a sum not exceeding an amount which will satisfy the execution. In the absence of such an order, the voluntary payment by a bank of a depositor's balance to a United States marshal to be applied on account of a fine imposed by a federal court convicting the depositor of a felony is not available as a defense to an action by the depositor against the bank to recover said balance. Berkman v. New York Produce Exchange Bank, 282.

2. *When courts of this state will not recognize a personal liability arising from foreign judgment — Jurisdiction — Actions — Service of process — Negotiable instruments.*— The courts of this state will not recognize a personal liability arising from a foreign judgment obtained upon service of process beyond the territorial jurisdiction of the foreign state. Where, in an action brought upon a judgment obtained in England against defendant as acceptor of a bill of exchange payable in that country, it appears that the service of process in the English action was effected upon the defendant personally in the state of New York but that he did not appear or defend, he is entitled to judgment. Kerr v. Tagliavia, 614.

See **Bailment; Contracts; Foreclosure.**

JUDICIAL SALES.
Real property — Summary proceedings — Landlord and tenant — Code Civ. Pro. § 2232.— A purchaser of real property at a judicial sale who finds others in possession cannot, except in the particular cases provided for by section 2232 of the Code of Civil Procedure, without further proof assume that they are his tenants, and cannot by service of a thirty days' notice have the benefit of summary proceedings which are applicable only where the conventional relation of landlord and tenant is shown to exist by agreement. Milligan v. Gabbett, 253.

JURISDICTION.
1. *Of Municipal Court of city of New York — Contracts — Sales — Trial — Appeal — Municipal Court Code,* §§ 70, 73.— The Municipal Court of the city of New York has jurisdiction of an action to recover the sum of $285, paid by plaintiff under a contract for the conditional sale of a piano alleged to have been retaken by defendants from plaintiff in violation of section 65 of the Personal Property Law. Where defend-

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JURISDICTION — Continued.
ants admit the contract, the amount paid and the retaking, but claim that the retaking was pursuant to an agreement for the rescission of the contract of sale or of a modification thereof, the decision of the trial court upon the question whether plaintiff consented to the retaking will not be disturbed on appeal. There is nothing in section 70 of the Municipal Court Code which in any way restricts or extends the jurisdiction of said court and section 73 of said Code has no application to the present action, which is neither for conversion nor in replevin. Dean v. Bauer, 301.

2. *Supreme Court — Constitutional law — Statutes — Rules — Actions.*— The Supreme Court where not restricted by constitutional or legislative enactments has power to declare, define and limit substantive rights in pending actions and proceedings of which it has jurisdiction and to prescribe rules of procedure for their protection and enforcement. Crocker-Wheeler Co. v. Genesee Recreation Co., 440.

3. *Of Surrogate's Court — Infants — Divorce — Guardians.*— Where by the terms of a decree of divorce the care and custody of an infant, the issue of the marriage, is limited to the joint lives of the parents, the decree has no possible operation after the death of either parent, in which event all matters of status of the parties and the infant are remitted to the common law, and where the infant is under the age of fourteen years the surrogate has jurisdiction to appoint a guardian for him. Matter of de Saulles, 447.

See **Wills.**

JUSTIFICATION.
See **Undertakings.**

LABOR LAW.
§§ 52*a*, 52*b*, 79*b* — *Constitutional law — Industrial commission.*— Plaintiff is the owner of a sixteen-story building 193 feet in height, used for factory purposes, with an occupancy of over 600 persons, of whom nearly two-thirds are engaged in factory work. The building is located on one of the busiest corners of two of the busiest thoroughfares in lower New York, and its sole interior stairway used as a means of exit is not inclosed with fire-resisting materials, nor is there any exit whatever therein that conforms to the requirements of section 79-b of the Labor Law. In an action authorized by sections 52-a and 52-b of the Labor Law, to review a decision of the industrial commission of the labor department made on appeal from certain orders issued by said commission and which require plaintiff to provide additional means of exit on each floor of the building remote from the existing exit, inclose all interior stairways serving as a required means of exit and the landings, platforms and passageways connecting therewith on all sides with partitions of fire-resisting material extending continuously from the basement to three feet above the roof, and provide all openings in said partitions with self-closing doors consisting of fire-resisting materials, *held*, that section 79-b of the Labor Law is constitutional; that plaintiff's factory building is unsafe for occupants in case of fire; that the orders made by the industrial commission were reasonable and necessary to effectuate the provisions of said section 79-b of the Labor Law, and that defendants are entitled to judgment for a dismissal of the complaint. Cockcroft v. Mitchell, 211.

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LABOR LAW.
See **Constitutional Law.**

LANDLORD AND TENANT.
Lease — Action for rent — Trial — Judgments — Appeal.— Where a landlord prior to the termination of a written lease notified the tenant that if she did not sign a new lease embodying proposed new terms she would not be allowed to hold over except upon the understanding that such holding over would be upon the new terms, the action of the tenant in holding over notwithstanding her oral objections to the new terms is, as matter of law, an acceptance of the landlord's proposition resulting in a renewal of the lease upon the new terms, and in an action for rent judgment for the dismissal of the complaint on the ground that no new lease had been established will be reversed and a new trial granted. Farrell v. Woodward, 560.

See **Lease.**

LEASE.
Provisions of — Landlord and tenant — Action for reformation — Judgments.— Where at the expiration of a five years' lease, with privilege to the tenants of a renewal for a like term upon the expiration of the contract on terms "then to be agreed upon," there was no mistake of fact as to its provisions, which were fully known to the parties, and neither fraud nor deception was practiced to procure the tenants' assent to the instrument, which was prepared by the landlord who assumed in good faith to explain the renewal clause, the tenants cannot be heard to complain that they misunderstood the legal import of their contract, which as to the renewal clause was void for indefiniteness. Where at the expiration of the term and upon the tenants' refusal to surrender possession of the premises they bring an action for the reformation of the lease claiming that they are entitled to a renewal for an ensuing term of five years, but it appears that the landlord declined to arrange any terms for such continued lease and demanded possession of the premises, he is entitled to judgment accordingly. Moran v. Wellington, 594.

LEGACY.
Lapsed — Gifts — Vesting — Wills — Title.— A lapsed legacy is one which has never vested or taken effect and has been defined as one which originally valid afterward fails because the capacity or willingness of the donee to take had ceased to exist before he obtained a vested interest in the gift. A condition subsequent annexed to a legacy will not upon breach operate to divest title of the legatee unless there is an express gift over on breach of the condition. If such a condition be possible of performance at the time of its imposition, and it afterward, either by act of God or operation of law, becomes impossible of performance, the estate of the grantee being once vested is not thereby divested. Sherman v. Richmond Hose Co. No. 2, 62.

See **Wills.**

LIENS.
See **Contracts; Partition.**

LIQUOR TAX LAW.
1. *As amended by chapter* 623 *of Laws of* 1917 *— Application for writ of certiorari denied — Statutes — Evidence.*— Upon an application for a writ of certiorari to review the determination of commissioners

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LIQUOR TAX LAW — Continued.
appointed by the mayor of the city of Lackawanna, pursuant to the provisions of the Liquor Tax Law, as amended by chapter 623 of the Laws of 1917, *held*, that one who became the owner of real estate therein before said statute took effect was legally qualified to act as commissioner. That under subdivision 7 of section 8 of said statute of 1917 the purpose and intent is declared to be to reduce the number of places wherein the trafficking in liquor may be continued to a given ratio on October 1, 1917, and to prevent after that date the issuance of any more liquor tax certificates in excess of the given ratio. That upon the evidence the commission so appointed by the mayor of said city has complied with paragraph 5 of subdivision 3 of section 8 of the statute in designating the places to be discontinued and those to be continued. That as there is nothing in subdivision 3 of section 8 of said statute of 1917 upon which a claim can be based that the commission is required to perform *quasi* judicial functions and no provision for a procedure contemplating the examination of witnesses or the taking of evidence, their acts in making the selections are not judicial in character and not reviewable by certiorari. Matter of Kersburg, 241.

2. *Provisions of, for appointment of commission by town boards — Villages — Towns — Certiorari.*— Before the amendment of section 8 of the Liquor Tax Law by chapter 623 of the Laws of 1917, the town of Kinderhook, Columbia county, was entitled to and had sixteen certificated places for the sale of liquor to be drunk on the premises, four in Kinderhook village, seven in the village of Valatie and five in the outlying territory. Under said amendment, the commission appointed by the town board, to reduce the number of places in the town as "nearly as may be" in proportion to the number of places then trafficking in liquor, certified to two in the village of Kinderhook, three in the village of Valatie and one in the town outside of the said villages. The state commissioner of excise, after notifying the county treasurer of Columbia county not to issue any certificates for the town of Kinderhook, filed a designation of places which were to be allowed to traffic in liquors after October 1, 1917, one to the village of Kinderhook, three to the village of Valatie and two to the town outside of said villages. *Held*, that as under said section 8, as so amended, the determination of the local commission was final and conclusive, the designations by it being made before September 1, 1917, the application of a resident of the village of Kinderhook whom the state commissioner of excise had omitted from his designation and of a resident of the village of Valatie whom he had also omitted from his designation substituting for him the name of some other person, both of said applicants being designated by the local commission, that the county treasurer issue to said applicants a liquor tax certificate to traffic in liquors designated by the local commission will be granted. Matter of Hickey, 323.

3. *Commissioners appointed to investigate places where traffic in liquor may be continued — Statutes — Laws of* 1917, *chap.* 623.— Chapter 623 of the Laws of 1917 which directs the three commissioners appointed by the mayor of a city to investigate as to the location of places within the city where trafficking in liquor was engaged in and to determine before September 1, 1917, the places within the munici-

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LIQUOR TAX LAW — Continued.
pality where such traffic may continue during the year beginning October 1, 1917, requires the commissioners to act as a board, and where due notice of the time and place of meeting is given to each commissioner, one of whom did not attend, the written statement, containing a description of the places where the traffic in liquor may be continued, as required by the statute, and signed by the other two commissioners, is a compliance therewith. People ex rel. Nally v. Sisson, 485.

4. §§ 30-*P*, 37(1) — *Violation of — Indictments — Misdemeanor — Fines — "Bone Dry Law" — Laws of* 1917, *chaps.* 623, 814.— One charged with a violation of section 30-P of the Liquor Tax Law, as amended by the "Bone Dry Law" (Laws of 1917, chaps. 623, 814), must be prosecuted by indictment and trial in a court of record as provided by section 37(1) of the Liquor Tax Law, though upon conviction he is punishable under section 36(2) of the Liquor Tax Law by a fine of not more than $500, or by imprisonment in a county jail or penitentiary for a term of not more than one year, or by both such fine and imprisonment. A Police Court, being a Court of Special Sessions, has no jurisdiction to render a judgment of conviction in such a case though defendant pleads guilty to the charge, and he must be discharged on habeas corpus. People ex rel. DeLesandro v. Hover, 646.

See **Statutes.**

MANDAMUS.

1. *When peremptory writ allowed — Tax sales in Rensselaer county — City of Troy — County treasurers — Real property — Tax Law*, §§ 122, 157, 160.— The court in awarding a peremptory writ of mandamus will mould it according to the just rights of all the parties, and where the petition sets forth a substantial right the proceeding will not fail because the relator asks too much or mistakes to some extent the relief to which he is entitled. By virtue of section 160 of the Tax Law (Laws of 1909, chap. 62) the provisions of articles 6 and 7 thereof do not affect any law relating to the sale of real estate for taxes in the city of Troy and the special statutory provisions under which county treasurers have conducted their tax sales in Rensselaer county are still in force so far as the city of Troy is concerned and as to such sale a county treasurer is not required to give the notice to the comptroller required by section 157 of the Tax Law. The special statutory provisions relating to sales for taxes in the county of Rensselaer outside of the city of Troy having been repealed by implication by chapter 908 of the Laws of 1896, as to such sales the county treasurer is required to give the notice to the state comptroller called for by section 157 of the Tax Law and to conduct the sale under the provisions of section 122 thereof. A peremptory writ of mandamus allowed as to certain tax sales in all of the county of Rensselaer outside of the city of Troy, including the city of Rensselaer created by chapter 359 of the Laws of 1897, and denied as to tax sales in the city of Troy. Matter of Albany Syndicate v. Runkle, 41.

2. *When application for, denied — Municipal corporations — Expenses connected with the maintenance of city and county hall borne equally by city of Buffalo and county of Erie — Statutes.*— Under a statute Laws of 1880, chap. 31, § 4, as amended by chapter 83, Laws of 1892),

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MANDAMUS — Continued.
providing that all the expenses connected with the maintenance of a city and county hall shall be borne equally by the city of Buffalo and the county of Erie, and that all appropriations therefor shall be paid to the trustees who shall yearly ascertain the amount required and certify the same to the board of supervisors of the county and to the common council of the city, and, further, that it shall be the duty of the said board of supervisors and the said common council to provide in equal proportions the amount of money required and place the same in the treasury of said city and county, respectively, subject to the order of the trustees for such purpose, the said common council in making appropriations for the ensuing year may take into consideration the unexpended balances of preceding years remaining in the hands of the trustees having charge of the building. Matter of Zittel v. Fuhrmann, 109.

3. *When peremptory writ of, granted — Corporations — Right of stockholder to inspect books.*— The common law right of a stockholder to inspect the books of his corporation in a proper way, at a proper time and place and for a proper purpose, has not been affected by legislation, and upon application made in good faith the court in its discretion, for good cause shown, may enforce the right by a peremptory writ of mandamus. Where upon the application of the one woman stockholder of a domestic manufacturing corporation, owned and controlled by the members of one family, who does not have the opportunity or permission or capacity to learn of the affairs of the company to the same degree as all of the other stockholders, it appears that she is entirely ignorant of the condition of the business, that no dividend has ever been received by her upon the shares of stock of which she is the owner and holder, and that she has no way of obtaining knowledge of the value thereof unless aided by legal process, she will be granted a peremptory writ of mandamus commanding the officers and directors of the corporation to exhibit to her and to her attorney and to a certified public accountant all books of accounts, records and papers of the corporation, with permission to fully examine the same and to take extracts therefrom. Matter of Wygant, 509.

4. *Application for peremptory writ denied — To compel secretary of state to transmit war ballots.*— Where, upon an application for a writ of peremptory mandamus to compel the secretary of state to forthwith transmit to the various counties in the city of New York the official war ballots above mentioned, it appears that all of such ballots have not yet been received by him and that it is his purpose to transmit all such ballots as soon as he can, not later than December 7, 1917, and it also appears that he has voluntarily furnished to the board of elections in New York city an unofficial tabulated statement containing all the information indorsed upon the envelopes containing such ballots, and it is not shown that he has omitted to discharge any duty imposed upon him by law in respect to them, the application will be denied. Matter of Boyle v. Hugo, 637.

5. *When application for peremptory writ granted — Contracts — Corporations — Negotiable instruments — Highway Law*, § 130(3).— Where, upon an application for a peremptory writ of amndamus, to compel the commissioner of highways of the state to return a certain

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MANDAMUS — Continued.
draft deposited with him by a foreign corporation not authorized to do business in this state at the time of the submission of its bid as sole bidder for the construction of a certain state highway, it appears that the commissioner had declined to award the contract to said company unless its bid was reduced to the engineer's estimate, which said corporation declined to do and in writing requested the return of said draft, and the commissioner about a month after declining to return the draft advised the corporation that it had been awarded the contract for the amount of its bid, the application will be granted on the ground that said commissioner had no right at any time, under section 130(3) of the Highway Law, to let the contract either to the corporation or to the assignee of its bid except for the amount specified in the engineer's estimate, or for a less amount. Matter of Harvey v. Duffey, 641.

6. *Peremptory writ of — When tax by assessors void — Actions — Certiorari — Greater New York Charter*, § 246.— Where an assessment though valid on its face is in fact void because the assessors had no jurisdiction to make it, an action is maintainable to recover money involuntarily paid in satisfaction thereof without first having the assessment set aside or vacated, and a demand for the money is unnecessary before action brought. Relator, the owner of certain premises in the city of New York, leased the same to a tenant which upon entering into possession installed certain machinery which was never owned or leased by relator. *Held*, that an assessment of the machinery as a part of relator's property, after correction and notification to the city's officers that said machinery was not owned by relator but by its tenant who also paid taxes thereon, was void *ab initio*. Where, notwithstanding such notification, the city continued for years to assess the value of the machinery as against relator, it was not compelled to bring certiorari to review the assessment but had the right to sue for and recover the amount of taxes illegally paid and the Statute of Limitations was no bar in equity to the claim, and at least so much thereof as had accrued within the last six years should be certified by the comptroller. A contention that the assessment was merely an overvaluation and not illegal would be of force on an application under section 246 of the Greater New York Charter for a peremptory writ of mandamus to compel the city comptroller to certify relator's claim to the board of estimate and apportionment as an invalid or illegal claim, but one which the city in equity and good conscience should pay, but for the fact that said section of the charter was passed for the very purpose of relieving those having just claims against the city of the law's many technicalities in tax proceedings. People ex rel. New York Edison Co. v. Prendergast, 686.

7. Compilation of statistical records — Greater New York Charter, § 149a, does not apply to the surrogates of the county of New York. Matter of Prendergast, 712.

MARRIAGE.
Action for breach of promise of — Damages — Trial — When motion to set aside verdict granted.— Where in an action for breach of promise of marriage plaintiff, who was twenty-nine years of age, admits that she did not love defendant who, though eighty-four years old and very rich, maintains considerable vigor though partially palsied, and

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MARRIAGE— Continued.
it appears that there was no period of courtship or engagement, that the plaintiff sustained no loss of social position, no loss of a chance to marry another, and incurred practically no expense in preparation, her only elements of damage being her mortification and wounded pride, and the loss of benefits she would have had, a verdict in her favor of $225,000, of which $25,000 was awarded as punitive damages and the balance as compensatory damages, will be reduced to $125,000, and in the event that plaintiff does not accept such reduction a motion to set aside the verdict and for a new trial will be granted. O'Brien v. Manning, 123.

MECHANICS' LIENS.
1. *Filing of — Bankruptcy — Priority — Foreclosure — Waiver.*— Where three days after the completion of a building the owner became bankrupt, a notice of mechanic's lien filed by a materialman giving the name of the bankrupt as the name of the owner of the property is good. A mechanic's lien filed within the ninety-days limit but not until the owner of the property had been adjudicated a bankrupt has priority over the claims of the trustee in bankruptcy as the lien is created not by the act of filing it but exists at all times from the furnishing of materials or labor. Horton v. Queens County Machinery Corp., Inc., 31.

2. *Foreclosure of — Actions — Contracts — Negotiable instruments — Costs — Code Civ. Pro.* § 3253.— Though two actions to foreclose mechanics' liens are tried together they must be decided separately, and requests to find submitted in form as if the actions had been consolidated will be refused as not in proper form. Where in an action to foreclose a mechanic's lien it appears that plaintiff, a materialman, has fully performed his contract with the principal contractor except in so far as prevented by defendants, he is entitled to recover the fair and reasonable value of the materials and labor furnished by him and has a valid lien on the property therefor. Where plaintiff accepted in settlement of two certain payments, one-half cash and one-half notes which did not bear interest, any item of interest on the notes cannot enter into the value of material delivered for which a lien is claimed. Under section 3253 of the Code of Civil Procedure an extra allowance of ten dollars is all that may be granted to the successful plaintiff herein. Greenberg v. Marsh, 181.

MONEY HAD AND RECEIVED.
Action for — Who has legal title to proceeds of stolen property — Greater New York Charter, §§ 331-336 — *Evidence — Criminal law.*— A thief has the legal title to the proceeds of a sale of property stolen by him. Upon the arrest of one who had stolen certain jewelry, the proceeds of a sale thereof upon being taken from his person were turned over to defendant, as property clerk, pursuant to sections 331-336 of the Greater New York Charter, the thief confessed, pleaded guilty to a charge of grand larceny in the first degree, the stolen property was returned to the owner but the purchasers from the thief took no action for the protection of any rights they might possibly have. *Held*, that upon the facts it was error to dismiss the complaint in an action for money had and received brought by the assignee of the thief to recover the money turned over to defendant as property clerk. That under a separate defense, that defendant was required to hold the money in

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MONEY HAD AND RECEIVED — Continued.
question to be used as evidence in certain criminal proceedings which were pending and undetermined, he was entitled to show that the certain persons proceeded against are the purchasers of the stolen property, the convicted thief, or even other persons for other crimes, and that, upon proof of such facts, plaintiff could not recover though the holder of the legal title to the money. That declarations of plaintiff's assignor made subsequently to the assignment of the money in question, as to his right to the proceeds of the sale of the stolen property, were inadmissible. Dinnebeil v. Ringer, 658.

MORTGAGES.
1. *"Usual" clauses — Statutes.*— Whether a clause in a mortgage is "usual" is a question of fact the determination of which depends upon whether it has been in general use, not whether it has a certain legal effect or even whether it conforms to any statute. Goldberg v. Norek, 371.

2. *Assignment for illegal purpose — Action to compel reassignment not maintainable.*— Where the assignment of a bond and mortgage was for the purpose of putting them out of the reach of the plaintiff in a negligence action brought against the assignor, and about a month thereafter the assignee, who advised the making of the assignment, by an instrument in writing declares that the bond and the mortgage belong to his assignor and that he, the assignee from whom no consideration passed for the assignment, makes no claim to the bond and mortgage, the law will leave the parties where it finds them, and an action to compel the reassignment of the bond and mortgage and an accounting for interest cannot be maintained. Dressel v. Hanser, 574.

3. *Foreclosure — When mortgagor not relieved from liability for deficiency — Contracts — Judgments.*— In an action to foreclose a mortgage a mortgagor who has subsequently transferred the property is not relieved from liability for a deficiency judgment where there is no agreement in writing between his grantee and the mortgagee extending the payment of the mortgage or changing the rate of interest. Rafel v. Maurer, 621.

See **Foreclosure.**

MOTIONS AND ORDERS.
1. *Actions — Calendar — Trial — Witness — When motion to dismiss granted.*— Six months after a judgment in favor of defendant in an action to recover for personal injuries alleged to have been caused by the negligence of defendant's chauffeur while operating his automobile had been reversed and a new trial ordered, plaintiff obtained an order to put the case on the calendar for trial on a day certain, but failed to file the order, and two months thereafter he obtained another order placing the case on the calendar for a day certain several months ahead and for failure of his counsel to appear on that day the case was sent to the foot of the general calendar. No attempt was made to have the case restored and it finally appeared on the call calendar six months later. *Held*, that defendant having clearly shown upon a motion to dismiss the action for lack of prosecution that in consequence of the delay it would be unable on the trial to produce eye-witnesses who were necessary and material and the

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MOTIONS AND ORDERS — Continued.
only witness he could produce was his chauffeur and plaintiff fails to give any substantial or adequate reason for the delay, an order denying the motion will be reversed and the motion granted. Curro v. Barrett, 411.

2. *When motion to frame issues denied — Default — General Rules of Practice, rule* 31.— Where defendant's motion to frame for a jury trial the issues raised by its counterclaim and the reply thereto was not made within twenty days after the joinder of issue, as required by rule 31 of the General Rules of Practice, and sufficient reason is not shown for overlooking the default, the motion will be denied in the discretion of the court. Manhattan Life Ins. Co. v. Hammerstein Opera Co., 608.

See **Judgments.**

MOVING PICTURES.
See **Injunctions.**

MUNICIPAL CORPORATIONS.
See **Mandamus.**

MUNICIPAL COURT CODE.
§ 27 (4). Hopkins v. Blosveren, 500.
§§ 40, 48, 54. Nerenberg v. Keith, 551.
§§ 70, 73. Dean v. Bauer, 301.
§ 92. Asch v. Price, 667.
§§ 129 (1), 154. Davidoff v. Chipornoi, 291.
§ 181. Davidoff v. Chipornoi, 291.

MUNICIPAL COURT OF THE CITY OF NEW YORK.
See **Jurisdiction.**

NEGLIGENCE.
1. *Action for personal injuries — Evidence — New trial.*— Where plaintiff in an action to recover for personal injuries, based on negligence, testified that while passing along the sidewalk in front of defendant's premises she stepped on something and then fell into the coal-hole and that when she looked the cover was about two feet away, the doctrine of *res ipsa loquitur* applies, and a judgment dismissing the complaint at the close of plaintiff's case will be reversed and a new trial granted. Miners v. Ausfresser, 394.

2. *Contributory — Actions — When defendant entitled to judgment.*— In unloading lumber from a car on a siding, two men were engaged in raising the lumber and plaintiff's intestate was engaged in blocking it. For some unexplained reason a piece of lumber was allowed to project from the side of the car toward the main track and one of the defendant's freight trains, running from two to four miles an hour, ran against the projected timber, causing it to turn so as to engage the body of plaintiff's intestate and throw him to the ground so near to the main track that some part of the engine or tender struck him on the head and killed him. *Held*, that on proof that the engineer when fifteen feet away from the car on the siding blew the whistle, applied the brakes, except the emergency brakes, and gave deceased notice to pull in the plank, defendant was entitled to judgment. Phalen v. Rae, 424.

See **Insurance (Indemnity)**; **Trial.**

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NEGOTIABLE INSTRUMENTS.
Action on corporation check brought by receiver of foreign corporation — Measure of defendant's liability — No rights of creditors involved. Martindale v. DeKay, 728.

See **Judgments; Pleading.**

NEW YORK CITY.
Building Code, § 22 — Ratification and confirmation by amended charter of 1901 — Building excavations — Support of adjoining walls. Gordon v. Automobile Club of America, 724.

OFFICE AND OFFICER.
Who not a public officer — Actions — City of New York — Highways. — The superintendent of highways in any of the boroughs of the city of New York is not a public officer, and one illegally removed from such office cannot maintain an action for money had and received to recover the amount of salary paid to defendant's testator while he occupied the office from which plaintiff had been ousted. Collins v. Scannell, 601.

OPTIONAL CITY GOVERNMENT LAW.
See **Constitutional Law.**

PARTITION.
1. *Action for — Title — Affidavits — Service by publication — Jurisdiction — Judicial sales.*— A purchaser at a partition sale who refuses to complete his purchase is required to point out the defect relied upon in the title and if it depends upon an impossible or remote contingency or upon the construction of inconsistent, conflicting or ambiguous statements in the affidavits on an application for an order for service by publication the court will disregard the defect and will give the statements in the affidavits such a construction if possible as will sustain the proceedings. Where jurisdiction to issue an order for service of a summons upon unknown defendants by publication depends upon the construction to be given to conflicting, inconsistent or ambiguous statements in the affidavits upon which the application for the order was made, the supplemental summons bringing in unknown defendants and the complaint in the action will be examined to ascertain the theory of the application for the order and the intention of the plaintiff and a construction of these statements in the affidavits will be adopted if possible which will sustain the proceedings rather than one which will invalidate them. McKenzie v. Woodward, 47.

2. *Motion for final judgment in — Allowances — Infants — Receivers — Actions — Liens — Evidence — Referees.*— Where, on motion for final judgment in an action for the partition of real estate, it is conceded that some of the amounts to be deducted from the gross proceeds of sale in order to arrive at the net proceeds divisible among the owners of shares cannot yet be determined, nevertheless allowances to parties in interest can be made. The value of the interest of each share owner in the property is the value of his undivided interest considered as a fraction of the whole property and not the particular sum of money he would receive after the deduction of liens of other share owners against his share. Where infant defendants in an action for partition have no personal interest in the properties involved, no

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PARTITION — Continued.
allowance may be granted to their guardian, but they are entitled to their taxable costs. Where a receiver of the rents of property sought to be partitioned appointed in another action having different parties was not made a party to the action for partition, evidence as to the amount of his lien on the property is inadmissible, unless the decree contains a provision that the amount to be paid to him be fixed. In an action for partition the referee appointed to sell has power and it is his duty to adjourn the closing of title to certain of the parcels purchased by one of the parties to the action who expects to apply on the purchase price her share of the proceeds of sale. The order of reference made in an action for partition may direct the referee to ascertain and report as to any matters not specifically enumerated but incidental to the matters before mentioned in the order or relating to or growing out of the interlocutory judgment or appropriate to be provided for in the final judgment. The interests of specific lienors in the action are sufficiently guarded by the following language of the final judgment: "After first paying from the proceeds of such other parcels the specific or general liens thereon." Fogarty v. Stange, 89.

3. *Of real property — Who entitled to bring — Wills — Actions — Evidence — Religious corporations — Decedent Estate Law*, § 17.— C., who died a resident of New Jersey possessed of personal property and seized of real property in New York and New Jersey, by his will gave most of his property to his executors in trust to receive the income and pay it over to a New Jersey religious corporation for certain purposes. The Court of Appeals held that such disposition of the property was within section 17 of the Decedent Estate Law forbidding a person having a husband, wife, child or parent from giving more than one-half of his or her estate to charitable, educational or religious institutions; that the whole estate wherever situated must be taken into account in determining how much of the real property in New York testator was authorized to give to said religious corporation and that if, under the law of New Jersey, said corporation was entitled to receive the personal property and the real property situated in that state which exceeded in value the real property in New York then the real property in New York passed to the heirs of C. At the trial there was uncontradicted testimony that under the law of New Jersey there was no limitation upon the right of said religious corporation to take the New Jersey real property and personal property. *Held*, that the real property in New York descended to the heirs of C. and they were entitled to bring an action for the partition thereof. Decker v. Hoag, 474.

PENAL LAW.
§ 1938. People v. Fitzgerald, 695.

PENALTIES.
1. *Action to recover — Pleading — Labels — Agricultural Law*, § 201. — The manufacturer of "Durkee's Salad Dressing and Meat Sauce" which is not an imitation nor offered for sale under the distinctive name of another article, and which contains no unwholesome added ingredients, is not required to disclose his trade formula in order that freedom may be secured from adulteration or imitation, and the complaint in an action against him to recover a penalty for an alleged violation of section 201 of the Agricultural Law, as amended by Laws

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PENALTIES — Continued.
of 1914, chapter 494, because of his failure to make a statement on the label used on such product as to the ingredients thereof, will be dismissed, with costs. People v. Durkee, 331.

2. *Action to recover — Trial — Statutes — Labels — Evidence — General Business Law*, § 367. Section 367 of the General Business Law is offended if one sells from a receptacle that has been refilled even with the same liquid manufactured by the manufacturer of the original contents of the receptacle. Where in an action to recover a penalty under the statute plaintiff makes proof that defendant sold, kept and offered for sale from a bottle bearing plaintiff's label, "Hostetter's Bitters," an article or substance other than the original contents of said bottle placed therein by plaintiff, it is error to dismiss the complaint as well as to refuse to allow a witness to identify the liquid sold to him. Hostetter Co. v. McGowan, 501.

PERSONAL PROPERTY LAW.
See **Fixtures.**

PLEADING.
Answer — Negotiable instruments — Accommodation indorsers — Municipal Court Code, § 92.— The answer in an action brought against the accommodation indorsers of a promissory note may be amended so as to allege a denial of the signatures to the instrument and a demand that they be proved as required by section 92 of the Municipal Court Code. Asch v. Price, 667.

See **Corporations; Counterclaims; Discovery; Evidence; False Imprisonment; Penalties; Specific Performance.**

POWER OF SALE.
See **Wills.**

PRIMARY ELECTIONS.
See **Election Law.**

PUBLIC SERVICE COMMISSIONS.
Duties of — Constitutional law — Corporations — Protection.— The public service commissions should not be hampered and obstructed in their efforts to secure increased transit facilities for the public by proceedings for a court review of their determination except in cases where it clearly appears that it is "necessary to keep them within the law and protect the constitutional rights of corporations over which they were given control." People ex rel. Brooklyn Heights R. R. Co. v. Public Service Commission, 10.

REAL PROPERTY.
See **Judicial Sales.**

REAL PROPERTY LAW.
See **Wills.**

RECEIVERS.
See **Foreclosure; Partition.**

REFEREES.
1. *Rights of — Appointment of — Fees — Reference — Estoppel — Motion to vacate report of referee when granted.*— The right of a referee appointed to take and state the accounts of the parties to an action, to fees, does not accrue until he has completed the reference and filed

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REFEREES — Continued.
or delivered his report. The conduct of such a referee in bargaining with the parties for his fees and demanding payment thereof in advance of the time when he is entitled to them tends to commercialize the administration of justice and to bring it into contempt and therefore cannot be tolerated. Where it appears that when the referee received his third payment on account of his fees it was distinctly understood that he was not to ask for a further fee until his report was completed, but he did, and his request was refused, defendant, by his participation in the arrangements for the payment of the referee's fees, is not estopped from moving to vacate his report and the motion will be granted. Voron v. Chait, 366.

2. *Report — What should state on margin of — Surrogates.*— A surrogate's referee should separately state his findings of fact and conclusions of law and note on the margin of his report his disposition of requests to find. Matter of Troughton, 388.

See **Partition.**

REGISTRATION.
See **Election Law.**

REMAINDERS.
See **Wills.**

RENSSELAER COUNTY.
See **Mandamus.**

RESTAURANT KEEPERS.
See **Bailment.**

SCHOOLS.
See **Constitutional Law.**

SECURITY FOR COSTS.
Who required to give — Bankruptcy — Costs — Code Civ. Pro. § 3268 (4).— In an action by a trustee in bankruptcy to recover the share of income payable to the bankrupt by the defendant as trustee for her under a last will, the plaintiff under section 3268(4) of the Code of Civil Procedure may be required to give security for costs, if the cause of action sued on arose before plaintiff's appointment as trustee in bankruptcy. Poskanzer v. Bullock, 590.

SERVICES.
See **Attorneys; Workmen's Compensation Law.**

SPECIFIC PERFORMANCE.
1. *Contracts — Consideration — Wills — Pleading — Evidence — Dismissal of complaint.* — By the will of her brother-in-law plaintiff was given a certain sum "for her services as housekeeper for me after the death of my wife, and in addition to what she has and may receive from me during my lifetime;" her daughter was given a certain sum "for assisting her mother about my housekeeping as aforesaid" and the remainder of the estate was given to testator's daughter. In an action to compel the specific performance of an alleged contract on the part of said daughter to make a will in plaintiff's favor, the complaint alleged that plaintiff's brother-in-law, becoming dissatisfied with

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SPECIFIC PERFORMANCE — Continued.
his will because he had not made adequate provision for plaintiff to compensate her for her services, desired to so change his will that his daughter should have the use of the residuary estate for life with remainder to plaintiff and that testator's daughter in order to induce him to refrain from changing his will and in order to induce plaintiff to continue her services to him agreed and promised to hold the residuary estate in trust for plaintiff and would by proper will give, devise and bequeath all of said residuary estate which should be received by her to plaintiff. The only witness as to the consideration for the alleged agreement was the daughter of plaintiff who testified that testator told his daughter that he wanted to change his will so as to give all his property to plaintiff after said daughter was through with it. *Held*, that plaintiff's daughter and her only heir was interested in the enforcement of the alleged contract and that as the consideration therefor was not shown by evidence other than that of said daughter, and her testimony not being corroborated, plaintiff had failed to prove the cause of action and the complaint must be dismissed. Cross v. Hoy, 75.

2. *Contracts — Title — Actions — Pleading — Judgments — Mortgages — Evidence.*— At the time of closing title under a land contract which required the vendees to give a mortgage containing the usual second mortgage clauses and conditions, they objected to a number of the clauses, and claiming that defendant would not perform the contract brought an action to impress a lien on the property for the down payment and for their expenses, and the defendant denying a failure on his part to perform the contract counterclaimed for a specific performance thereof. Upon the trial plaintiffs insisted that clauses in the mortgage requiring the mortgagor upon request to certify the amount due on the mortgage and providing in case of foreclosure for the appointment of a receiver without notice, and the assignment of the rents, were unusual, but the court found upon uncontradicted evidence that said clauses were in fact the usual clauses and conditions found in second mortgages. *Held*, that the complaint should be dismissed and defendant given judgment for the specific performance of the contract. Goldberg v. Norek, 371.

STATUTE OF LIMITATIONS.
1. *What sufficient to stop running of — Executors and administrators — Code Civ. Pro.* § 382(1).—Where letters testamentary upon the estate of one who died December 23, 1905, were not issued until July 17, 1908, and a claim against the estate for services rendered to the decedent covering a period up to January 11, 1905, and presented to the executor January 11, 1911, was not rejected until June 18, 1915, after the commencement of the proceeding for the judicial settlement of his accounts, an admission of the validity of the claim contained in a conversation between the claimant and the executor's attorney, as to which there was no contradiction, was sufficient to stop the running of the six-year Statute of Limitations under section 382(1) of the Code of Civil Procedure. Matter of Fingar, 516.

2. *Waiver of — Banks.*— The formal waiver of the Statute of Limitations by the directors of the bank more than six years after the adoption of the resolution in question, though probably sufficient to meet that defense if there was shown to have been an original obligation to

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STATUTE OF LIMITATIONS — Continued.
repay the money, could not create an obligation where none had ever existed. If it can be treated as an admission of the existence of such an obligation it was not conclusive and being inconsistent with the conceded facts did not justify a finding that the original transaction was a loan. Andrews v. Cosmopolitan Bank, 672.

STATUTES.
1. *Construction of — Municipal Court Code,* § 181.— The rule that a statute will not be construed to have a retrospective effect unless the language clearly so requires is not applicable to statutes which only regulate procedure or affect the remedy, and the new procedure is not rendered unavailable by the general provision of section 181 of the Municipal Court Code that it shall not be retroactive. Davidoff v. Chipornoi, 291.

2. *Power of legislature to reduce the number of liquor tax certificates — Authority to local commission to determine what existing places shall be licensed — Liquor Tax Law.*— The legislature, having power to reduce the number of liquor tax certificates in the state by limiting the number in proportion to the population, for the purpose of reducing the existing number may authorize a local commission to determine, after investigation and inquiry, which existing places shall be licensed and which shall not be, and may provide that their determination is final and conclusive. People ex rel. Reuther v. Sisson, 429.

See **Attachment; Constitutional Law; Jurisdiction; Liquor Tax Law; Mandamus; Mortgages; Surrogate's Court; Trustees; Wills; Workmen's Compensation Law.**

SUMMARY PROCEEDINGS.
See **Injunctions.**

SUNDAY.
See **Election Law.**

SUPPLEMENTARY PROCEEDINGS.
When motion to dismiss granted — Theatres — Executions — Code Civ. Pro. § 2458(1).— A theatre in the city of New York at which a judgment debtor was playing an engagement as an actor, at the time of the institution of proceedings supplementary to an execution issued upon the judgment recovered against him, is not "a place for the regular transaction of business in person" in the county of New York, within the meaning of section 2458(1) of the Code of Civil Procedure, it appearing that he transacted no business at the theatre during his engagement there, and that when not on the stage he was in his dressing-room changing for the next act, and his motion to dismiss the proceedings will be granted. Matter of DeAngelli v. Dixey, 606.

SURETIES.
When released — Contracts — Default.— A surety without notice will be released from his obligation to meet a deficiency under a contract of employment to sell and deliver merchandise where the contract without his knowledge has been modified in a substantial respect, or where it has been terminated and subsequently renewed without the consent of the surety and the default occurred during the renewal period. Grand Union Tea Co. v. Potter, 52.

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SURROGATE'S COURT.

Jurisdiction of, to appoint guardians for infants — Supreme Court — Statutes.— The jurisdiction of Surrogate's Court to appoint guardians for infants is concurrent with the jurisdiction of the Supreme Court, and the court which first acquires jurisdiction in the orderly course of procedure should be protected in the exercise of its jurisdiction. The jurisdiction of the Surrogate's Court to appoint guardians for infants is by statute made as extensive as the power of the former chancellor and the surrogate in making such appointments is bound by the principles prevailing in the former Court of Chancery. Matter of De Saulles, 447.

See **Jurisdiction.**

SURVIVORSHIP.

Accounting — Executors and administrators — Evidence — Decedents' estates — Insurance (life).— A decedent, his wife and daughter perished in a common disaster and there was no evidence to show which of them was the last survivor. At the time of his death the decedent carried two policies of insurance upon his life. One of the administrators of the wife's estate claimed that her representatives were entitled to the proceeds of the two policies in question and to the entire net distributive amount of the decedent's estate as her distributive share, but the accounting administrator rejected the claim. In determining the validity of the same, and the question whether the daughter survived the decedent and her mother or either of them, *held*, that under the common law one claiming through survivorship must prove such survivorship; that there is no presumption of survivorship in a case where persons perish in a common disaster, and that in the absence of evidence the fact of survivorship is assumed to be unascertainable and property rights are disposed of as if death occurred at the same time. That under the policies in question the interest of the wife was contingent and a mere expectancy which did not vest until the death of the insured; that survivorship was a condition precedent to the vesting, and that the onus of proving such survivorship was upon the claimant. That as there was no evidence to prove such survivorship the death benefit must be disposed of as though both husband and wife had died at the same instant and that it must be distributed as though she had died before her husband, in which event it vested in him and was payable to his personal representative. That there being no evidence on the subject, and the law indulging in no presumption, no determination can be made as to whether the daughter survived either or both of her parents. That the other property for which the administrator accounts must be likewise distributed, as though the decedent, his wife and his child had died at the same time. Matter of Hammer, 351.

TAXES.

See **Transfer Tax.**

TELEPHONE COMPANIES.

Contracts — Provisions of — When customer not entitled to restoration of service.— A provision of a contract for a telephone service that the rate specified is payable in advance in equal monthly installments remains in force if the service is continued beyond the term of the contract. Where a contract is "for a term beginning with the establishment of service and ending one year from the first day of the following month and thereafter until terminated by ten days' notice in

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TELEPHONE COMPANIES — Continued.
writing by either party to the other," and upon nonpayment of the monthly rental in advance the telephone company discontinues its service and removes its apparatus, the customer is not entitled to a restoration of the service unless a new contract is made. **Hare v.** New York Telephone Co., 490.

TITLE.
See **Money Had and Received; Partition; Specific Performance.**

TOWNS.
See **Liquor Tax Law.**

TRANSFER TAX.
What not subject to — Taxes — Mortgages — Corporations — Domicile — Decedent's estate — Laws of 1915, *chap.* 664, § 220, *as amended.* — The amendment (Laws of 1915, chap. 664) to section 220 of the Tax Law, which provides for the imposition of a tax upon the transfer "of any intangible property," does not apply to bonds executed by an individual and such bonds and mortgages whether located in this state or in the state of a decedent's domicile are not subject to a transfer tax in this state. A bond and mortgage given by a corporation on its real estate in this state as part consideration of the purchase price thereof, or for money loaned to the corporation, owned by a non-resident decedent at the time of her death, is not subject to a transfer tax here. Matter of Richards, 391.

See **Domicile.**

TRANSPORTATION CORPORATIONS LAW.
See **Carriers.**

TRIAL.
1. *Action to recover for loss of horse — Negligence — Judgments — Nonsuit — Evidence — Jury.* — At the time of the killing of a horse belonging to A, by coming in contact with a live telephone wire belonging to plaintiff herein which had burned and fallen so that the ends reached the ground, the defendant was maintaining a heavily charged electric light wire just above the telephone wire and which sagged thereon. In an action to recover for the loss of the horse, which resulted in a judgment in favor of plaintiff therein, notice to defend was served on defendant herein, but it did not, and it appeared without contradiction that the defendant in that action knew that the electric light wire sagged and that it did nothing to protect its wire, and by the charge to the jury defendant's liability was predicated upon its knowledge of the danger of the situation, coupled with its failure to exercise proper precautions to prevent accident. The defendant against whom the judgment was recovered paid it, and brought the present action to recover the amount paid, claiming that the death of the horse was caused primarily by the negligence of the defendant in the present action, and on the trial, over objection, plaintiff herein was permitted to show that it did exercise some precautions to protect its wires from the electric light wire. Pending the decision of a motion for nonsuit at the close of plaintiff's case and at the close of all the evidence, the jury on the submission of certain questions found that the accident was caused by the contact of the wires; that plaintiff exercised reasonable care; that defendant did not; that its negligence was the prime and efficient cause of the accident and that the damages

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TRIAL — Continued.
were a certain sum. On granting defendant's motion for a nonsuit, *held*, that, as the action was based upon the judgment rendered in the action to recover for the loss of the horse, plaintiff herein could not deny or contradict the facts upon which that judgment was recovered with other facts but must accept the findings there made upon the questions there litigated and determined. That the answers of the jury to the questions submitted relating to plaintiff's care and to the primal and efficient cause of the accident must be set aside on the law. Hudson Valley R. Co. v. Mechanicville Electric Light & Gas Co., 152.

2. *In foreclosure action — Pleading — Actions.*— Though the answer in a foreclosure action pleads counterclaims which if defendant had brought actions thereon would have been triable as matter of right by a jury, it is not entitled to such a trial in the foreclosure action. Manhattan Life Ins. Co. v. Hammerstein Opera Co, 608.

TRUSTEES.
Rights of testamentary — Who competent to serve — Wills — Aliens — Statutes — Laws of 1914, *chap.* 443.— The rights and status of a testamentary trustee flow exclusively from the will and not from the letters of trusteeship issued upon the probate of the will. Prior to the enactment of chapter 115 of the Laws of 1914, which provides that no person is competent to serve as a testamentary trustee who is an alien not an inhabitant of the state, an alien was competent to take a trusteeship of personalty. Said statute is not retroactive and does not apply to the qualifications of persons named as trustees in a will probated prior to the enactment of said statute. Matter of Ripley, 465.

TRUSTS.
Deeds of — Wills — Who entitled to corpus of trust fund — Transfer tax.— Decedent executed a deed of trust by which he transferred a certain sum to the trustees to pay the income to him during his life, and if his wife survived him to pay the principal to her within thirty days after his death, but if she died before payment was actually made then to pay the principal to such persons as she designated in her will, and if she died intestate to pay the principal to his executors as part of his residuary estate; if his wife died during his lifetime then to pay the principal to him. *Held*, that so far as any act of the donor was concerned the deed of trust was irrevocable and his wife having survived him more than thirty days became absolutely entitled to the *corpus* of the trust fund as of the date of the execution of the trust deed, her right of possession being deferred until his death. That the value of the *corpus* of the trust fund for the purpose of a transfer tax should be taken as of the date of decedent's death and that the property transferred by said deed of trust should not be added to the value of the property transferred to decedent's wife under his will. Matter of Garcia, 387.

See **Bankruptcy; Wills.**

UNDERTAKINGS.
Appeal — Justification of sureties — When motion to vacate denied — Code Civ. Pro. § 1335.— Under section 1335 of the Code of Civil Procedure, which provides that the sureties on an undertaking on appeal "must justify before the court below, or a judge thereof, or a referee appointed by the same, or a county judge," the justification of sureties

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UNDERTAKINGS — Continued.
may be taken before the county judge of a county other than that in which the action is brought. Where a notice of justification of the sureties in an undertaking on appeal was returned for the reason that the justification was not to take place in the county in which the venue of the action was laid, a motion to vacate and set aside the undertaking will be denied. Boss v. Hutchinson, 1.

VENUE.
1. *When motion to change, denied — Corporations — Residence — Actions — Code Civ. Pro.* § 984.— Under section 984 of the Code of Civil Procedure a corporation may be deemed to have a residence where it owns property and actually transacts a substantial part of its business and its residence is not confined to the county where its certificate of incorporation is filed. Where plaintiff, a corporation having its principal office in the city of New York, where it owns a plant for baking, also owns and operates three bakeries in the city of Buffalo, N. Y., with about 300 employees, and all its business in the western part of the state, including the county of defendant's residence, is carried on from the city of Buffalo, defendant's motion to change the place of trial from Erie county to Tioga county, where he resides, in an action to recover a balance due for baked goods shipped to him from Buffalo will be denied. General Baking Co. v. Daniell, 382.

2. *When motion for change of, denied — Actions — Witness — Code Civ. Pro.* § 768.— Where, in an action against the city of New York, defendant moves under section 262 of the Greater New York Charter for a change of venue from Ulster county to New York county, plaintiffs, under section 768 of the Code of Civil Procedure, as amended in 1911, may oppose such motion by pleading the convenience of witnesses and asking that the place of trial be not changed, and, where it appears that a greater number of necessary and material witnesses reside in Ulster county than in New York county, defendant's motion will be denied and plaintiff's granted. MacArthur Brothers Co. v. City of New York, 591.

VERDICT.
In action for rent — Lease — Evidence — When verdict should not be set aside.— Where, in an action for rent of the fourth loft of a building, the testimony of defendants tended to establish their defense of constructive eviction because of their inability to ship goods owing to the suspension of elevator service provided for by the lease, and that they acted with reasonable promptness in leaving the premises, a verdict in their favor should not have been set aside; and an order granting plaintiff's motion to set aside the verdict will be reversed and the verdict reinstated. Read v. Levy, 547.

VILLAGES.
See **Liquor Tax Law; Wills.**

WARRANT.
See **Attachment.**

WILLS.
1. *Probate of — Action to compel determination of title — Evidence — Jurisdiction — Statutes — Surrogates.*— Upon the day of the probate of an instrument purporting to be a last will and testament by which the alleged testator devised certain real property in equal shares to

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A and B, two of his four surviving brothers, who were his only heirs and next of kin, each of three of them conveyed an undivided one-fourth of the property to A who immediately entered into possession and together with his heirs and assigns have ever since continued in the actual and undisputed possession of the property under claim of title. In an action to compel a determination of the title brought upon the theory that the probate of the will was without jurisdiction and without proof of a compliance of the requirements of the statute, plaintiff, who holds the title through A, contended that the will was ineffectual for the conveyance of the real estate and that in consequence it descended to all the brothers of the alleged testator as by intestacy. *Held*, that plaintiff was entitled to attack the alleged will and its probate. That as it affirmatively appeared from the record of the alleged probate of the alleged will that there was no sworn evidence before the surrogate of the execution of the instrument in the manner prescribed by statute, nor evidence sufficient to invest him with jurisdiction to admit it to probate, the presumption of the decree of probate was rebutted, and as a result A inherited an undivided one-quarter of the premises in question and by the conveyances from his brothers acquired full and complete title to the other three-quarters thereof, and having thereafter held the same for more than twenty years under open and undisputed claim of title the ownership of plaintiff, claiming under A, was indefeasible and no interest therein vested in one who claimed that B, to whom he stood in succession, took one-half of the premises under the alleged will and having conveyed only an undivided one-fourth thereof ownership of the remaining one-fourth was vested in him and demanded judgment to that effect. That the failure of proof before the surrogate of the due execution of the will in the manner required by statute could not be cured by an admission of the testator's brothers, signed and duly acknowledged but not sworn to, in which it was conceded that the facts which they declined to testify to under oath did in fact exist. Carthage Development Co., Inc., v. Cushman, 57.

2. *Provisions of — Legacy — Vesting — Gifts — Title.*—A will provided that a bequest of a certain sum to a hose company should be kept at all times intact and the income devoted to the reasonable and proper use of the legatee for whatever purposes its members acting as an organization might see fit to direct, and the will further provided that if for any reason the legacy should lapse, or fail, or for any cause not take effect, in whole or in part, the legacy should go to another. The hose company was in existence at the time of the death of the testatrix. *Held*, that the legacy became vested and neither lapsed nor failed because by an act of the legislature the hose company was thereafter deprived of power to use the fund for fire fighting purposes. The gift of the income of the fund having been made with no conflicting disposition of the *corpus* thereof the members of the hose company in the circumstances took title to the same. Sherman v. Richmond Hose Co. No. 2, 62.

3. *Provisions of — Legacy — Power of sale — Dower — Election — Evidence — Real Property Law*, § 200.— Where a testator, who at his death was the owner of real property worth $2,000 and some household furniture of but little value, bequeathed to his wife all his personal

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WILLS — Conttnued.
estate, an additional legacy to her of $1,000, if accepted, is an implied charge on real estate passing under the residuary clause, though the will does not expressly charge the real estate with the payment of the legacy. The will, which contained no power of sale, was executed more than four years prior to testator's death and his wife died more than five years later and during the whole of the intervening period and until her death she occupied the real property and had possession of her husband's will, which was admitted to probate more than seven months after her death. No portion of the real estate was assigned to her for dower, she brought no action therefor, neither was her time to make her election between the legacy and dower enlarged or extended nor was there any evidence on her part of a willingness or of an intention either to accept or decline the legacy. *Held*, that having failed to make an election as required by section 200 of the Real Property Law she must be deemed to have accepted the legacy in lieu of dower, and that her personal representative has a claim therefor against the husband's estate. Matter of Lockwood, 177.

4. *Directions contained in — Construction of — Power of disposition — Trusts — Aggression — Real Property Law*, § 153.— Where the clause of the will of testatrix, by which she gave the rest of her property to trustees for the purpose of investment, management and payment of the net income to her husband for life, directs that during his lifetime he use as much of the principal of the estate "as in his judgment is necessary and proper and that he in no way be held liable or accountable for such principal so used," and it appears from a reading of the whole will that the estates given to other legatees were all intended to be subordinate to the authority conferred upon her husband and that the provisions for other legatees and remaindermen were intended to provide for a possible or probable remainder rather than a certain one, it will be held that under section 153 of the Real Property Law which provides that: "Every power of disposition by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit, is deemed absolute," the husband who has already taken a portion of the principal under a claim of right to all of it has an absolute power of disposition; and that while not liable for any property used within the wide limits of his authority he must be held accountable for any aggression beyond that. Matter of Briggs, 191.

5. *Terms of — Construction of — When legacies not chargeable on real estate — Evidence.*— Where the intention of a testator to charge legacies upon his real estate is not clearly ascertainable from the terms of his will or from extrinsic evidence, legacies should not be so charged. Matter of Lummis, 258.

6. *Construction of — Trusts — Vested remainder — Intestacy.* — Where the general scheme of a will indicates that it was the intention of testator, who was survived by a son and two daughters, that the son, or in case of his death his issue, should ultimately receive the major part of the estate which he divided into three parts to be held on separate trusts during the lifetime of each of his children, and the son died leaving him surviving three children all of whom are living, and thereafter S., one of testator's daughters, died without issue, under a clause of the will that "Upon and immediately after the

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WILLS — Continued.
death of my said daughter Sarah, I give and bequeath the said equal third part of my estate hereby given in trust for her to my said daughter Carrie and my said son William, in case they shall both be then living, to be equally divided between them forever; and in case my said daughter Sarah shall survive my said daughter Carrie, then and in such case, I give and bequeath the whole of the said equal third part hereby given in trust for my said daughter Sarah, from and after her death, to my said son William, or in case of his previous death, then to his lawful issue forever," the gift over on the death of S. will be construed as a vested remainder in the surviving daughter, C., and the son, and in the event of his death before S. his issue became entitled to receive the one-half their father would have taken had he survived S. While such construction may not seem to give effect to the words "in case they should both be living," a literal application of said phrase would enforce intestacy as to the trust fund, a result certainly not within the contemplation of testator. Matter of Radford, 278.

7. *Construction of — Devise — Gift — Villages — Power of sale — General Municipal Law*, § 73 — *Code Civ. Pro.* § 2615.— A devise and bequest of the home of testatrix with its furnishings to the trustees of a village to be used by it as a general and emergency hospital for the care and treatment of the sick and injured was conditioned upon the village raising each year a certain sum by tax for the general support, care and maintenance of said hospital, with a proviso that in case the home should not be used by the village for the designated purpose, or used at any time for any other purpose, or its officers neglected to carry out the purposes of the devise and bequest, the same should become null and void, the property sold and the proceeds given to another institution. In a proceeding under section 2615 of the Code of Civil Procedure for the construction of the will, *held*, that in case the gift was accepted by the village and the hospital otherwise established and maintained in a manner prescribed by the will and sufficient money is raised by tax from time to time, which with gifts and revenues derived from other sources will support and maintain said hospital to conform to the true spirit and intent of the will, and it should be clearly unnecessary to that end to raise the sum in any year or years, the failure to raise such sum by tax will not work a forfeiture and nullify the gift. However, the provision that the devise and bequest should become null and void, etc., is to be considered as the suggestion of testatrix as to the manner, character and extent the hospital is to be maintained, and should it ever become a question of fact as to whether it is being maintained for the purposes and in the manner directed by the will, all the circumstances would have to be considered in connection with the direction in the will as to raising money; otherwise, if the hospital is not in good faith maintained as directed by and for the purposes designated in the will, the property will be forfeited. Under section 73 of the General Municipal Law, which provides that real and personal estates may be granted and conveyed to the corporation of any city or village of this state to be held in trust for any purpose of education, or the diffusion of knowledge, or for the relief of distress, the village and its trustees have legal capacity to receive said devise and the accompanying bequest for the purposes specified in the will. A contention that all blacksmith tools, firearms, guns, revolvers, carpenter tools, farming tools and other articles mentioned

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WILLS — Continued.
in the inventory and in the testimony do not belong in the furnishings of the house and that articles obtained and purchased since the making of the will are to be deemed general assets of the estate not specifically bequeathed to the village, upheld. The direction in the will that the real estate be sold in a certain event, and the proceeds given to another institution, vested a power of sale in the executors, though such power was not specifically given by the will. Matter of Hemstreet, 340.

8. *Codicils — Intention of testator — Legacy — Residuary estate.*— Prior to the death of C., his brother T., who survived him but has since died, made a will which contained the following clause: " *Ninth.* I direct that if after all my just debts and funeral expenses are paid it is found that there is not a sufficient amount remaining to pay in full the sums to the persons herein mentioned, then said persons are to receive the sums in proportion to the amounts set opposite their names, and providing there is a remainder after all just debts and persons have been fully satisfied, as heretofore named, then said remainder is to be divided *pro rata* among " the said designated persons. About ten months after C.'s death T. executed a codicil to his will ratifying and confirming the same and making the payment of certain legacies a charge upon the estate. *Held*, that reading the will and codicil together, and regarding the former as republished as of the date of the latter, it was the intention of T. to dispose of his entire estate and he intended his residuary estate, whether real or personal, to go to the persons named in the ninth clause of his will and that he used language sufficient to effectuate that intention. Decker v. Hoag, 474.

9. *Provisions of — Devise of real property — Insufficiency of assets to pay debts — Executors and administrators — Mortgages — Trusts— Remainders — Bequests — Legacy — Abatement.*— A devisee of real property subject to mortgage must satisfy it out of his own property without resorting to the executor of his testatrix unless by the will payment of the mortgage is otherwise directed. A testatrix whose assets at the time of her death were insufficient to pay the legacies and to set up the trusts created by her will died seized of fourteen pieces of real estate, ten of which, at that time, were subject to mortgage and included two pieces specifically devised, the income from one of which, since that time, had not been sufficient to pay the necessary carrying charges. The executors and trustees were authorized and directed to keep the estate in good order and repair, pay all taxes, assessments or liens which might be assessed or levied thereon, keep the same insured, pay off all mortgages and incumbrances on real estate which might exist thereon at the decease of testatrix, and they were also empowered to sell, mortgage or lease any or all property not specifically devised, as they might from time to time deem best for the purpose of carrying out the provisions of the will. *Held*, that it was the intention of testatrix that all mortgages, being liens upon her property at the time of her death, should be paid from her general estate. A certain clause of the will provided that upon the death of the various life beneficiaries of income the principal should be returned to and become a part of the residuary estate, or, in certain instances, should go to the issue of the particular beneficiary, if any, or in default of such issue the same should become a part of the residuary estate. By another clause of the will all the rest, residue and remainder of the estate, both real and personal, not otherwise specifically disposed of, was devised and

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WILLS — Continued.
bequeathed to a nephew of testatrix for life and on his death the trust for his benefit should cease and the property divided among his surviving children and the issue of any deceased child *per stirpes*. *Held*, that the remainder of the various trust funds must first be applied in payment of general legacies. A bequest to an incorporated cemetery association, in trust to apply the income therefrom to caring for and keeping in good order the burial plot of testatrix in said cemetery, is to be deemed a part of her funeral expenses, does not abate and should be paid in full. By the third clause of her will testatrix bequeathed to her executors and trustees the sum of $5,000 to be used by them for the erection of a vault upon her burial plot, but on account of the size of said plot the rules of the cemetery prohibited the erection of a mausoleum, and it appeared by the affidavit of one of the executors that a very ample allowance for the performance and completion of the work necessary to the fullest compliance possible with the directions of the will would not exceed the sum of $1,500. *Held*, that as the trust so created had partially failed it was valid as a charitable use, and under the doctrine of *cy-pres* the executors may set up a trust in the sum of $1,500 and carry out as near as possible the trust as set forth in said clause of the will, without prejudice to the other legatees; that the balance of the sum set apart by said clause becomes a part of the general assets of the estate and should be first applied to the payment of the general legacies. Testatrix bequeathed to the "Home for Old Men and Aged Couples," etc., the sum of $5,000 on the death of her husband's niece "as hereinafter mentioned" to whom by the next clause of the will was bequeathed the sum of $20,000 for life and on her death the sum of $5,000 "as hereinbefore mentioned" was given to said "Home." By abatement the fund for the benefit to the said niece was reduced to the sum of $8,920.32. *Held*, that the bequest to the "Home" was a demonstrative legacy payable out of the principal of the trust fund, and that a proposed method of distribution thereof by which the "Home" was to receive one-quarter thereof plus its proportionate share of the remaining three-quarters of said fund, which under the proposed decree is to be distributed ratably among the other legatees entitled thereto, was erroneous. Matter of Brundage, 528.

10. *Loose pages — Attestation clause — Statutes — Witnesses — Testamentary capacity.*— An instrument offered for probate as a last will consisted of three sheets of paper not fastened together but so arranged that the page containing the date of the document was before that containing the signature of the testator and after that came the third page containing a clause which was not an attestation clause in the accepted sense of that term signed by the subscribing witnesses, and as so arranged the several sheets were folded and placed in an envelope. On the hearing of the petition for probate the facts of testator's testamentary capacity and that he declared the instrument to be his last will were fully established. The clause subscribed by the witnesses was dated and signed seventeen months after the date of the will, they signing the same in testator's presence and with his acquiescence after the will and said clause had been read to him. *Held*, that the statute having been substantially complied with, probate will be decreed. Matter of Cogan, 652.

See Domicile; Specific Performance; Trusts; Witness.

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WITNESS.
See **Depositions; Motions and Orders; Wills.**

WORKMEN'S COMPENSATION LAW.
1. § 13 — *Employee may not maintain separate action to recover from employer — Services — Statutes.*— Under section 13 of the Workmen's Compensation Law, an injured employee may not maintain a separate and independent action to recover from an employer who neglects or refuses, after due request, to provide any of the medical, surgical or hospital services referred to in said statute. Semmen v. Butterick Publishing Co., 285.

2. §§ 11, 50 — *Action for personal injuries — Evidence — Negligence — Statutes.*— Under section 11 of the Workmen's Compensation Law the remedy therein afforded to an employee against his employer for personal injuries received in the course of his employment is exclusive, and in an action by an employee who, while at work in a cellar in defendant's factory, was bitten by a dog kept there by the engineer for a year or more, presumably with the permission of the defendant, the burden is on plaintiff to show that the statute did not apply by reason of defendant's failure to secure the payment of compensation as required by the statute; and where no proof is offered to sustain the allegation of the complaint of such failure on the part of defendant a judgment in plaintiff's favor will be reversed and a new trial ordered, as the language of section 50 of said statute, which is mandatory on every employer in this respect, gives rise to the presumption that the defendant had complied with such duty. The plaintiff was engaged in the performance of the duties of his employment at the time he was injured, and the presence of the dog with defendant's implied knowledge and consent was one of the physical conditions of the plant under which the defendant required plaintiff to perform his duties. Barone v. Brambach Piano Co., 669.

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